Reports of Cases
In The
High Court of Chancery.
VOL. II
1816

CASES

IN

CHANCERY, &c.

THE SITTINGS AFTER HILARY TERM, 45 GEO. 3, 1805.

1805.

April 2.

CHAMBERS v. GOLDWIN.

Testator directed maintenance for his sons during minority, and for his daughter till 21, or marriage; and gave her a legacy, in case she should attain 21; payable at, and to carry interest from, that time. Having married at 18, she was allowed maintenance for the interval, until 21. (1)

TRISTRAM RATCLIFFE, by his will, devised estates in the island of *Jamaica*, with the stock, &c. to trustees, and their heirs, upon trust; to pay debts, and also to maintain and educate his sons during their minorities, and his daughter until her age of 21 years, or day of marriage, which should first happen, in such manner as his trustees should think proper; and, subject thereto, he devised his estates to his sons, charged with the payment thereout of the sums of 10,000*l.* and 5000*l.* currency to his daughter, in case she should live to attain her age of 21 years: the same to carry interest from the time of her attaining such age of 21, at the rate of 6*l. per cent.*; and to be paid by instalments; the first payment to be made, when and if she should attain 21.

The decree directed an inquiry, who had maintained the children; and what was proper to be allowed for their maintenance for the time past, since the death of their father, and to come. The report stated, that * the Plaintiff, *Mrs. Chambers*, the testator's daughter, was maintained according to the directions of the will, until her marriage, upon the 3d of *January*, 1795, when she was of the age of 18; and from that time, till she attained 21, in 1798, by her husband. The cause coming on for further directions, the question was upon the claim of the Plaintiffs for the maintenance of *Mrs. Chambers* from the time of her marriage until her age of 21 years. [* 2]

{(1) *The Matter of Bostwick*, 4 Johns. Cha. Rep. 100.}

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CHAMBERS v. GOLDWIN.

Legacy to a child, payable at a future day Maintenance allowed, though no direction as to interest

The Lord CHANCELLOR.—This is the most doubtful case that has occurred upon the point of maintenance But, upon the whole, the testator having expressly provided for maintenance up to a certain period, leaving a chasm unprovided for, and having given interest, as interest, from the period of majority to the time when the legacy was to be paid, the Court may infer, that he did not mean that this child should have nothing in that interval; by analogy to the case of a legacy to a child payable at a future day, though nothing is said about interest, the Court infers, that the father did not intend that the child should not be maintained, and receive education, during the whole period of the infancy.(a) A reasonable maintenance therefore ought to be allowed from the age of 18, when the Plaintiffs married, until *Mrs Chambers* attained 21.

(a) See *Cadell v. Palmer, ante*, vol. iii. 10. *Mitchell v. B[illegible], ante*, vol. iii. 283. *[illegible] v. T[illegible]d, ante*, vol. iv. 1. *Greenwell v. Greenwell, ante*, vol. v. 194, and the cases stated in the notes. *Cole v. Blackburn, ante*, vol. ix. 470.

[3]

April 5.

Ex parte WILLIAMS

Upon a dissolution of partnership, by the retirement of a partner, followed by Bankruptcy, the right of the joint creditors against joint property, remaining in specie, depends upon the *bona fides*. The transaction in this instance having that character, the petition of joint creditors was dismissed

PORTER SHEPHERD and *Richard Smith* carrying on business at *King's Lynn*, in partnership as linen-drapers, dissolved their partnership on the 5th of *September*, 1803, inserting a notice in the *London Gazette*, on the 25th of *November* in that year, stating, that the partnership was dissolved by mutual consent on the 5th of *September* last and that all debts due from the partnership were to be paid, and would be discharged, by *Shepherd*

On the 24th of *December* following, a Commission of Bankruptcy issued against *Shepherd* The Assignees under the Commission possessed joint property of the Bankrupt and *Smith* The petitioners, being joint creditors, presented a petition; praying, that they might be permitted to prove under the Commission; that distinct accounts might be kept, and, that the joint effects might be first applied to the joint debts, and the separate effects to the separate debts, &c. Under that petition an inquiry was directed, whether there was any joint property, and, if there was, it was ordered, that the joint creditors should be at liberty to prove their debts, and that the joint property should be divided among them. The result of that inquiry was, that effects, to a considerable amount, belonging to the partners at the dissolution of the partner-

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ship, were remaining in specie; and that several outstanding debts to the partnership were still remaining due.

The petitioners contended before the Commissioners, that the specific property, and outstanding debts, belonging to the partnership, were to be considered as joint effects, and applicable to the joint debts; but the opinion of the Commissioners was, that such effects, remaining in specie, had, by the effect of the dissolution of the partnership, become the separate property of *Shepherd*, and applicable in the first instance to his separate debts; and in taking the accounts they refused to include any [4] part of such specific effects, as forming part of the joint estate, (except certain debts owing to the partners.) The Bankrupt by affidavit stated, that it was fully agreed between him and *Smith*, that *Smith* should give up and deliver to him the whole of the stock and effects; that the deponent should have and take the same to his own use and account; and, that the deponent should pay all the joint debts; and, that he never considered himself as accountable to *Smith* for, or liable to pay him, any part of the surplus, if any should remain after payment of the joint debts; and, that the goods were exposed to sale by the deponent on his account.

This petition was therefore presented, praying an account of the specific effects of *Shepherd* and *Smith*, and that such effects may be declared to form part of the joint estate, &c.

Mr. Richards, and Mr. Cooke, in support of the Petition, distinguished this case from *Ex parte Ruffin:*(a) in the latter a solemn act by assignment taking place, from which it was sufficiently manifest, that the continuing partner for valuable consideration took the property, and he was for a year and a half treated by all the world as a sole trader; in this instance there was nothing but an advertisement, following the mere fact of general dissolution, and delivery of the effects by the retiring partner to the other; who, as in every case, was to pay the debts, and the Bankruptcy followed immediately.

Mr. Romilly, and Mr. Cullen, for the Assignees, relied upon *Ex parte Ruffin;* observing, that no assignment in writing is necessary; and, that the person continuing the trade, being to pay the debts, must have the means.

[5]

Equity among partners; and the consequences upon a dissolution, with reference to each other and creditors.

The Lord CHANCELLOR.—I have frequently, since I decided the case *Ex parte Ruffin*, considered it, and I approve that decision. In a subsequent case the dissolution took place only a week before the question arose; and the true question, I thought, was upon the *bona fides* of the

(a) *Ante*, vol. vi. 119. *Ex parte Fell, ante*, vol. x. [illegible].

transaction; whether that, which had been joint estate, had become separate estate. The grounds upon which I went in *Ex parte Ruffin* were these. Among partners clear equities subsist, amounting to something like lien. The property is joint: the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions: or, if there is a deficiency, to call upon each other to make up that deficiency, according to their proportions. But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners, and get judgment; and may execute his judgment against the effects of the partnership. But, when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment; clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate, or create, an interest by suit. There are various ways of dissolving a partnership; efflux of time: the death of one partner: the Bankruptcy of one; which operates like death: or, as in this instance, a dry, naked, agreement, that the partnership shall be dissolved. In no one of those cases can it be said, that to all intents and purposes the partnership is dissolved; for the connexion still remains until the affairs are wound up. The representative of a deceased partner, or the Assignees of a Bankrupt partner, are not strictly partners with the survivor, or the solvent partner: but still in either of those [26] cases that community of interest remains, that is necessary, until the affairs are wound up, and that requires, that what was partnership property before shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves, require: and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as in the case of death it is the equity of the deceased partner, that enables the creditors to bring forward the distribution. The creditors are not injured by the agreement of partners to dissolve the partnership, and that from that time what was joint property shall become the separate property of one; notice of the dissolution being given; as either a consideration is paid; or, which for this purpose is equal to consideration, a covenant is entered into to pay the debts, and indemnify the retiring partner, so conceived, as not to leave any lien upon the property. Upon any other principle the conclusion must be, that a partner could not retire from *Child's* house; as the effects may be distributed 20 years hence among the creditors, if they remain so

If creditors do not like the arrangement, they must go to each of the partners, and desire payment.

Another material ground is, that, where the possession of the property is delivered over to the surviving partner, and he goes into the world as a sole trader, he has all the credit, belonging to him as such sole trader; having the possession, and dealing with mankind, as such. I qualify it so, for I do not agree, that mere dissolution will work all this effect as that does no more than declare, that the partnership is not to be carried on any further, except for winding up the affairs: and he who has actual possession, has it, clothed with a trust for the other, to apply the property to the debts, and that will qualify the nature of his possession. so that it cannot be said, he has the sole possession of the specific effects, or the debts; to bring it within the operation of the Statute of *King James*, (a) which certainly affects debts. Having had occasion lately (b) to look into that doctrine from *Twyne's* case, (c) I think, in modern times a tendency has prevailed to give more effect to the actual, manual, possession, as evidence of fraud, than *Twyne's* case was intended to sanction But it is enough to say, mere dissolution of partnership, if there is no more, leaves each partner in possession as a trustee for all, to the extent of enabling each to call upon all to apply the partnership effects to the purposes to which they ought to be applied, even if there was no dissolution. But it is the equity of the partners among each other, that requires that application; not that of the creditors, for whom however a provision is thereby necessarily operated, which they could not operate for themselves, unless by action and execution, laying hold of the effects; as they might of the person. [7]

Debts which are within the Statutes, 21 *Jac.* I. c. 19. s. 10, 11.

The question then is, whether the contract for dissolution has left these equities attaching upon the possession. If it is competent to partners to say, those equities shall no longer exist, inquiry is necessary, to ascertain whether, by the bargain for the dissolution, that which was the property of all, has become the property of one. In *Ex parte Ruffin*, (d) there could be no doubt upon that: a legal instrument being produced, the legal effect of which was such as I have stated. That case was no more than that, a Bankruptcy happening a considerable time after the execution of the deed, the effects came to be considered the separate effects of the trader, in whose hands they were left; and the other was only to come in as a creditor. Upon the facts of this case, without saying, [8]

(a) Stat 21 *Jac.* I c. 19 *sect.* 10, 11. See *Jones* v *Gibbons*, *ante*, vol ix. 407.
(b) See *Lady Arundell* v *Phipps*, *ante*, vol. x 139
(c) 3 *Rep* 80
(d) *Ante*, vol vi 119.

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whether the conclusion of the Commissioners as to the joint debts is right, there is distinct evidence of an agreement, that the joint effects should be considered separate effects. and that fact calls upon me to declare the conclusion of law, that these are separate effects

Petition dismissed

April 6.

Ex parte HIGGINS.

Jurisdiction in Bankruptcy to compel witnesses to attend the Commissioners to prove the act of Bankruptcy, reserving just exceptions viz by a Solicitor, professionally employed.

THE object of this petition was to compel the attendance of witnesses before the Commissioners under a Commission of Bankruptcy, to prove the Act of Bankruptcy: The Act of Bankruptcy, upon which the Commission was taken out, was a deed of assignment of all the joint and separate property of the persons, against whom the Commission issued, and the persons, summoned to prove the Act of Bankruptcy, were the persons, to whom that assignment was made, and the Solicitor, who prepared it; and who refused to attend, alleging, that he knew of no circumstances, except what came to his knowledge professionally.

Mr Cooke, in support of the Petition, relied upon the late orders, (a) upon the ground, that the Commissioners cannot order an attendance, before the Bankruptcy is declared.

[9] *Mr. Richards, and Mr Cullen, opposed the Petition*

The Lord CHANCELLOR.—I made the order in the case referred to, and two or three cases since, upon this principle; that, unless it is held in Bankruptcy, that The Lord *Chancellor* has a power implied to make good the proceeding under the Statute, the jurisdiction actually exercised in many cases, particularly by attachment and commitment, stands upon nothing. I found in a book of Lord *Hardwicke's* that he had proceeded upon that principle; an implied authority of The Lord *Chancellor* to order the attendance of any one to substantiate that proceeding. As to the delicacy expressed by one of the witnesses in this case, that he was the confidential agent, the answer is, that is no reason for not obeying the summons. but he ought to go before the Commissioners, and state the objection: and they will attend to all reasonable objections. If the jurisdiction cannot be supported in some

(a) *Ex parte Lord*, ante, vol vi. 781 See *Ex parte Kirk*, ante, vol vii. 312.

such way, no one can say, upon what principle The Lord *Chancellor* has committed persons in Bankruptcy; for there is no special authority any where for it. Suppose an inquiry directed in the Master's office, and the party would not attend: the Court would immediately order a Commission to issue for that very reason, and then the party must attend. The order certainly shall be without prejudice to any objection made by the witness before the Commissioners.

The order was, that the several persons should attend before the Commissioners, reserving just exceptions as to any questions that may be put to them by the Commissioners.

Ex parte HOLYLAND.

[10]

April 9.

It is directed upon a lunacy established by two verdicts (1).

To supersede a Commission, it is not necessary that the mind should be restored to its original state. Competence to contract, purposes as to make a will of personal estate, is sufficient. But the absence of the disorder, especially if of a dangerous tendency, satisfactorily proved by the evidence of persons having competent knowledge of the whole subject, not only as to the present

THE object of this petition was to supersede a Commission of Lunacy; under which the petitioner had been found a lunatic by two verdicts: one upon the usual proceeding; the other under an issue, directed upon a former application by the petitioner to supersede the Commission. The nature of his disorder was violence to a dangerous degree, with threats against his wife, and all, who were concerned in supporting the Commission. At the time this application was made his wife was dead: but the petition was opposed by the petitioner's daughter, and her husband, who was the Committee.

Mr. Alexander, Mr. Romilly, and Mr. Hart, in support of the Petition: Mr. Piggott, Mr. Cooke, and Mr. Johnson, against it.

The Lord CHANCELLOR.—There is no part of the duty, that occurs in the exercise of this jurisdiction, more unpleasant, and requiring greater caution, than that of determining when a Commission should be superseded; for, though you may upon evidence arrive at a safe conclusion, establishing lunacy, it is very difficult to determine when the mind is restored, depending upon the circumstance, whether the party is led to those topics, upon persons, having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence (2)

{(1) See *The Matter of Hendel*, 1 Johns. Cha Rep 600.}

{(2) *In the Matter of Ha..s*, 5 John Cha. Rep 567.}

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which it was affected. The case, in which the lunatic is now in the management of the estate of his own committee, we are all acquainted with. In another case I succeeded in getting Lord *Thurlow*, after a very long conversation with the party, to supersede the Commission; and was satisfied, from many conferences with him, that he was perfectly rational: but immediately after the pe-
[11] tition was heard, coming to thank me for my exertions, he in five minutes convinced me, that the worst thing that could have been done for him, was to get rid of the Commission. In the case of *Mrs. Barker* (a) Lord *Thurlow* said, that, where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property, or, with reference to such a case as this; for, suppose the strongest mind reduced by the delirium of a fever, or any other cause, to a very inferior degree of capacity, admitting of making a will of personal estate, to which a boy of the age of 14 is competent; the conclusion is not just, that, as that person is not what he had been, he should not be allowed to make a will of personal estate. There may be frequent instances of men restored to a state of mind, inferior to what they possessed before; yet it would not be right to support Commissions against them. On the other hand, if lunacy has been satisfactorily established, particularly, where there is a tendency to do great personal harm to others, I ought to be sure, by the evidence of persons having competent knowledge upon the whole of the subject, that there is an absence of that disorder; and, that those tendencies may not be brought forward, when it may not be generally known, that there is any providence of the law thrown over the individual.

A boy of the age of 14 competent to make a will of personal estate.

There is in this case considerable evidence that the petitioner is recovered. But, if the whole nature of the case has not been stated to the physician, who swears, that he has frequently seen the petitioner, and believes him to be of sound mind; unless he can go further, and state, that the ground of the opinions of those medical
[12] gentlemen who thought otherwise, was laid before him, that he has had an opportunity of considering it, and the result of the whole is, that, just and accurate as those conclusions were, or inaccurate, upon his own conclusion satisfactorily formed, the present state of the party is as he represents it; unless the affidavit comes with some such exposition, though the conclusion may be right, not having those particulars before me, I cannot try the truth

(a) The *Attorney-General* v *Parnther*, 3 *Bro. C. C.* 441.

of the inference. The question in this instance may be, whether the existence of the Commission may not be necessary, in order to secure to the party the utmost comfort and happiness he is capable of enjoying. This case is reduced to that state, in which it is fit again to ask the opinion of a jury, whether this Commission, which has been supported by two verdicts, ought to continue. It must therefore be tried in an issue.

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WRIGHT *v.* MORLEY.
MORLEY *v.* ST. ALBAN.

ROLLS. 1804. *November* 13. 1805. *February* 9. *March* 29.

Assignment by a husband of part of his wife's equitable interest, viz. dividends of stock in trust for her, for valuable consideration, enforced upon the bill of a surety for the husband, to be indemnified against past and future payments: the assignment extending only to 100*l.* a-year out of 200*l.* The remaining dividends under a bill on behalf of the wife, paid to her, the husband having after the assignment gone abroad, without making any provision for her.

BY indentures between *Henry Cason, Thomas St. Alban* and *Richard Dyer*, reciting, that *Charles Edwards* bequeathed 4000*l.* upon trust, to be laid out in 5 *per cent.* Bank Annuities, and to permit his wife, *Frances Edwards*, from time to time, for and during the term of her life, to receive and take to and for her own use and benefit the interest, dividends or proceeds, which should or might arise and become due and payable thereout, * and from and immediately after the decease of his said wife upon further trust, that they should sell out all the said stock, and pay the money, which should arise by the sale, to and amongst the testator's three children, *Thomas, Frances*, and *Mary Edwards*, when they should respectively attain the age of 21, share and share alike, with survivorship: and further reciting, that after the death of the testator *St. Alban* married his widow, and that *Dyer* had agreed with him for the purchase of an Annuity of 100*l.* to be paid during the joint lives of *St. Alban* and his wife, at the price of 600*l.* and that for securing the payment of that Annuity, *St. Alban*, and Sir *George Wright*, as his surety, by their bond became jointly and severally bound to *Dyer*, it was witnessed, that in pursuance of the said agreement, and in consideration of the sum of 600*l.* paid to *St. Alban* by *Dyer*, *St. Alban* did bargain, sell, assign, transfer, &c. to *Dyer*, his executors, &c. all the interest, dividends, and annual proceeds, of the sum of 5201*l.* 5 *per cent.* Bank Annuities, in which the said sum of 4000*l.* had been invested, which under the will of *Edwards* should from time to time during the joint lives of *St. Alban* and his wife become due and payable to them, or to him in right of his wife; upon trust to retain the said annuity; and to pay the residue from time to time to *Mr. St. Alban*, his executors, &c., or, as he should appoint.

* 13

Mr. St. Alban gave a bond of indemnity to the surety.

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and afterwards went abroad. The trustees of the stock refusing to make any payment under the grant of the Annuity, the surety was called upon: and, having paid 100*l* he filed a bill against the trustees, and *Dyer*, and *Mr. St. Alban*, who was stated to be out of the jurisdiction, and his wife, charging, that she was privy to the grant of the Annuity, and agreed, that the dividends of the stock should be chargeable with it, and that she would [14] have executed the grant, but that *Dyer* was advised, that she was not a necessary party, and praying, that the trustees of the stock may be decreed to repay to the Plaintiff what he has paid, and that an appropriation may be made to answer the future payments of the Annuity during the life of *Mrs. St. Alban*.

Mrs. St. Alban by her answer admitted, that she was privy to the treaty for the Annuity, and consented, that her husband should make the dividends of the Bank Annuities chargeable with the payment; and, that she consented to execute, and would have executed, the grant, except for the reason stated in the bill: but she submitted, that, as her consent was obtained while under coverture, and as she had by her next friend filed a bill against the trustees of the stock for an account of the dividends accrued, since her husband left the kingdom, and praying, that they may be applied for her maintenance, which suit is still depending, the deed did not pass her interest in the Bank Annuities.

The other cause was instituted on behalf of *Mrs. St Alban*, as stated in her answer, claiming to have all the dividends paid to her, alleging, that her husband had left the kingdom without making any provision for her.

Mr. Fonblanque, and *Mr. Maddock*, *for the Plaintiff Wright*, insisted, that the disposition made by the will in favour of *Mrs. St. Alban* could not exclude any future husband from taking, *jure mariti* the benefit of the bequest, and therefore the wife could not resist the claim of the Plaintiff. They cited Sir *Edward Turner's* case. (a) *Tut* v. *Hunt*. (b) *Tudor* v. *Samyne*, (c) and *Mitford* v. *Mitford*. (d)

[15] As to the claim of the Plaintiff's wife in the second cause, upon the various discussions of *Alexander* v. *M'Culloch* (a) Lord *Thurlow* showed a strong disposition to make the parties come together by a species of duress; but could do no more than refuse to give the husband any part, and after running the hazard for four or five years, which would be the survivor, it was at length compro-

(a) 1 *Ch. Ca.* 307. 1 *Vern.* 7. (b) 1 *Vern.* 18. 2 *Freem.* 78.
(c) 2 P. [illegible] 270. (d) *Ante*, vol. ix. 87.
(a) p. 15. Cited *ante*, vol. ii. 192, in *Ball* v. *Montgomery*.

mised. So in *Bond* v. *Simmons* (b) and *Ball* v. *Montgomery*, (c) the Court did not affect to dispose of the property, but only impounded it. 1805.

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Mr. Romilly, and *Mr. W. Agar*, *for Mrs. St. Albans*.—This precise question has never been decided. Certainly the property is not given to the separate use of the Defendant: but her husband is entitled in her right. There is no doubt, if he wants the assistance of the Court, he must make a settlement, and Lord *Alvanley* very frequently said, (d) there is no ground for the distinction in the instance of a particular assignee for valuable consideration, as the Plaintiff certainly is, who, being in no better situation than the husband, is equally bound to make a settlement before he can have the assistance of the Court. In *Oswell* v. *Probert* (e) Lord *Rosslyn* seems to entertain the same opinion; that there is no distinction between an assignee for valuable consideration, and by operation of law, stating the equity against persons, claiming in right of the husband, however meritorious their consideration. The only question is upon the particular nature of the property, a life interest. The Court does not compel the husband to make a provision out of that, where they have been living together: but, where the wife is deserted by the husband, will compel the application of a life interest, as much as a sum in gross. [16] *Watkyns* v. *Watkyns*. (a) *Colmer* v. *Colmer* there cited, (b) reported in *Mosely*, (c) a book of no authority certainly: *Allerton* v. *Knowell*. (d) In *Bullock* v. *Menzies* (e) the husband declared, that he was ready to receive his wife, and she would not go back, and in *Ball* v. *Montgomery* (f) the wife had eloped, and would not return. This lady is deserted by her husband after the grant of the Annuity. The cases, upon the subject upon terms for years, do not apply. The term passes by the assignment, upon which the party can bring an action: an interest very different from that which passes merely by the decree of a Court of Equity. The concurrence of the wife, when under control, is perfectly immaterial, and cannot bind her. The Court will not permit the husband to strip himself of the power of maintaining his wife, and will take the whole fund, in order to compel him to maintain her.

Mr. Fonblanque, *in Reply*.—The Assignee relies upon the legal title, not the concurrence of the wife in the trans-

(b) 3 *Atk.* 20. (c) *Ante*, [illegible] 191.
(d) See *Macaulay* v. *Philips*, *ante*, vol. iv. 15. *Franco* v. *Franco*, *ante*, vol. iv. 515, and *Hill* v. *Atkinson*, stated in the note, *ante* vol. iv. 530.
(e) *Ante*, vol. ii. 680. (a) p. 1[illegible] 2 *Atk.* 96.
(b) 2 *Atk.* 98, also cited 3 *Atk.* [illegible] 2[illegible] 264. (c) *Mos.* 121.
(d) Cited *ante*, vol. iv. 79[illegible] (e) *Ante*, vol. [illegible] 7[illegible]
(f) *Ante*, vol. ii. 191.

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action. There is no equity, controlling the marital right, existing at the date of the assignment; which cannot be affected by his subsequent conduct in withdrawing from her. The claim of the creditor, being prior in date, and attaching upon the marital right, will be preferred. In this case the wife will not be left destitute.

The Master of the Rolls.—As it does not appear, that any case precisely the same as this has received a decision, I shall take some time to look into the authorities, [17] with reference to the question, whether there is any difference between an assignment for valuable consideration and by operation of law. I agree, Lord *Alvanley* did uniformly maintain, that there is no difference between them, with reference to the equity of the wife: at the same time, looking with great attention to the point in *Mitford* v. *Mitford*,(a) it appeared to me, that there were some cases, which it is very difficult to reconcile with that proposition, for there is hardly any other ground, upon which Lord *Hardwicke* proceeded in some of the cases before him. Upon principle there is great weight in that proposition of Lord *Alvanley*, for, if the husband has but the right of reducing the wife's interest into possession, how can he for valuable consideration, or otherwise, convey more than he has? If he does not reduce it into possession it clearly survives. If then he parts with it for valuable consideration, and the assignee acquires a right different from that which the husband had, he parts with something different from what he has. In *Mitford* v. *Mitford*(b) I had no occasion to give an opinion upon that point, for at all events it was in favour of the wife; holding, that, supposing that distinction to exist, yet an assignment by operation of the Bankrupt Laws is not an assignment for valuable consideration; and therefore, though an assignment for valuable consideration should carry the right, yet it never was contended, that an assignment by mere operation of law had any other effect than to put the assignee in the place and stead of the husband. Therefore, though there might be a doubt upon the other point, it was not necessary in that case to decide it. But Lord *Alvanley* would have admitted, that, where the property of the wife consisted only of a life interest, the husband would be entitled to that in [18] her right without making a settlement, as a general proposition; as a mere life interest is applicable to the maintenance, and ought to be taken by the husband for the maintenance of both. The Court therefore does not call for a separate provision for her from that; which is

Assignees under a Commission of Bankruptcy are in the place of the Bankrupt with reference to the equitable interest of his wife.

(a) *Ante*, vol. ix. 87. (b) *Ante*, vol. ix. 87.

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no more than giving a separate maintenance: but that is not the object of a separate provision; which is to be a provision for her and the family after the husband's death.

If it stood there, there is no doubt the husband has a right to deal with it so long as he maintains her, and there is no doubt of his right to make a specific disposition, if he maintained her. That leads to the question, whether in the case of abandonment by the husband, ceasing to maintain his wife, there is an equity for her to have her own life interest laid hold of by this Court, supposing it not reduced into possession by the husband, being still in the hands of trustees. One question is, whether that is settled, merely as between the husband and wife, and putting third persons out of consideration: if so, the second point is, whether this equity prevails, where, previously to the abandonment the husband has made an assignment of the wife's interest, or any part of it. That question, so far from being decided, has not even been made the gist of a case. It therefore deserves a great deal of consideration. Another point is as to the assignment having taken place, when the husband was performing his duty by maintaining his wife, whether the abandonment afterwards shall devest the right, which the assignee of the fund had vested in him.

As to the question upon the right of the surety to maintain this suit, for the purpose of considering that question the claim of the wife must be laid out of view; for, if she succeeds, there is an end of his claim. As far as the husband is interested, I do not see, how he, or his trustees, can state that objection to the surety for the husband. He has assigned this, as a specific fund, out of which this Annuity ought to be paid; and procures another person to join him, and the surety is obliged to pay. Can the husband object, that the surety cannot come against that fund which ought originally to have been applied? I do not therefore see any objection to the Plaintiff coming for this relief; supposing the wife's equity does not prevail against him. [19]

1805. February 7.

This cause was further argued, upon a doubt, suggested by *The Master of the Rolls*, whether the surety could file the bill.

In support of the bill it was insisted, that the surety might stand in the place of the creditor, and avail himself of the pledge to reimburse himself: the subject, though not in trust for the separate use of the wife, being liable to the marital right; which is in full force until the claim in respect of the equity of the wife is interposed:

1805. Wright v. Moritt. Moritt v. St. Alban.

the husband, dealing with it *pleno jure*, as his own entirely, does not require the concurrence of his wife in the assignment.

On the part of *Mrs St. Alban* it was insisted, that the bill represented *Mrs. St Alban* as a co-surety by her agreement, that her husband should make the property a security for his debt; and the utmost the Plaintiff could do, was to put himself in the place of the husband; who, having abandoned his wife, and gone into a foreign country, could not have got this property, until he returned, and made a proper provision for his wife.

[20] March 23. *The Master of the Rolls*.—In these causes *Mrs St Alban* was before her marriage entitled for life to dividends of stock, standing in the name of trustees. It does not appear, that there was any settlement. After the marriage her husband granted an Annuity, and assigned the dividends to secure it, and it is alleged, that soon afterwards he quitted the Kingdom without making any provision for her. The surety, being called upon, pays some instalments, and files a bill, praying out of the dividends to be repaid those instalments, and, that a sufficient portion shall be set apart to answer the future payments, so as to exonerate him from the obligation of continuing to pay the Annuity. The other bill is filed on the part of the wife, stating, that her husband had abandoned her, and praying, that the whole of the dividends may be paid to her for her separate use.

The first question is, whether this assignment by *Mr. St. Alban* of the dividends of his wife is binding upon her. If it is not, the Plaintiff *Wright* cannot have any relief upon his bill. If it is, the question is still made, whether the *Plaintiff* is entitled to the relief he seeks. Upon the first question, it does not appear, that the circumstances make it necessary to determine the much-litigated question, whether the equity of the wife can be barred, or affected, by the husband's assignment for valuable consideration. Thus much is certain, that, if the particular assignee for valuable consideration be not in a better, at least he is not in a worse, condition than the general Assignees under a Commission of Bankruptcy. When the husband becomes a Bankrupt, and consequently incapable of maintaining his wife, it is not held, that she is entitled to the whole of the dividends of her fortune, or of any life interest that she may have, any more than she is entitled to the whole of her fortune, consisting of a capital sum. Indeed in *Ex parte Coysgarne* (a) Lord *Hardwicke*

As to the effect of an assignment for valuable consideration, by a husband, of his wife's equitable interest, with reference to her equity for a provision, *Query*.

[21]

(a) 1 *Atk.* 192

gave the wife against the Assignees of the Bankrupt the whole of the Annuity belonging to her before marriage. Also in *Vandenanker* v. *Desborough* (b) the Court gave the whole to the wife against the Assignees. But these cases have not been followed by more modern decisions; for in *Pryor* v. *Hill*, (c) *Oswell* v. *Probert*, (d) *Burdon* v. *Dean*, (e) *Brown* v. *Clarke*, (f) and *Lumb* v. *Milnes*, (g) the Court has held, that the Assignees of the Bankrupt husband were entitled to the life interest of the wife, subject only to the equity, requiring some provision for her out of that interest. In *Pryor* v. *Hill* it was contended, that equity of the wife did not extend to the case of a life interest, upon the principle, that the husband becomes absolute purchaser of that by the marriage, in consequence of the obligation to maintain his wife, thereby contracted. That argument however did not prevail, any more than the contrary proposition, attempted in *Burdon* v. *Dean*, where it was argued, that the life interest did not fall under the assignment, as it must be held, that it was given to the wife merely for maintenance. The result therefore is, that the life interest does pass to the Assignees, subject to the ordinary equity for a settlement.

1805.

WRIGHT v. MORLEY.

MORLEY v. ST. ALBAN.

Assignees of a Bankrupt are entitled to the equitable interest for life of a wife, as well as capital, subject to the equity requiring a provision for her out of it.

If then in this case, instead of a particular Assignee for a valuable consideration, I had before me merely the general Assignees under a Commission of Bankruptcy, the wife could not, as against them, set up a claim for the whole of the dividends. I should think, they dealt fairly, and even favourably, towards her, if out of 260*l.* the produce of this fund, they allowed her to retain 160*l.* [22] It is unnecessary therefore to consider, what might have been the case, if the husband had charged this fund to its whole amount, or to any greater extent than he has charged it; for I must hold the assignment valid to the extent of the 100*l.* *per annum*, with which he has charged the fund.

The question then is, whether the Court will act upon that assignment at the instance of the surety, in whose favour it is not made. The surety is the only Plaintiff. The Annuitant, who has the assignment of the dividends, does not join. At the hearing I thought the Plaintiff entitled to the equity he seeks. Afterwards I had some doubt: but I adhere to my first opinion. I conceive, that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the

(b) 2 *Ves.* 96.
(c) 1 *Bro.* C. C. 139.
(d) *Ante*, vol. ii. 680.
(e) *Ante*, vol. ii. 607.
(f) *Ante*, vol. iv. 166.
(g) *Ante*, vol. [illegible]

1805. WRIGHT v. MORLEY. MORLEY v. ST. ALBAN.

securities the principal gives to the creditor.(1) There is a very strong instance of the application of that equity in *Parsons* v. *Briddock*. (*a*) The principal had given bail in an action. Judgment was recovered against the bail. Afterwards the surety was called upon, and paid; and it was held, that he was entitled to an assignment of the judgment against the bail: so that, though the bail were themselves but sureties, as between them and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety. Consequently that decision established, that the surety had precisely the same right that the creditor had; and was to stand in his place. The surety had no direct contract * or engagement, by which the bail were bound to him, but only a claim against them through the medium of the creditor: and was entitled only to all his rights. There are other cases establishing the same principle, though not quite so strong as that. The surety therefore, with regard to the payments he has actually made of this Annuity, is entitled to stand in the place of the creditor, and to be reimbursed out of the dividends, and has also an equity to have the fund applied in his exoneration, that fund being provided by the principal debtor; and made subject to the payment of this Annuity.

Surety entitled to the same right as the creditor, even against bail.

[* 23]

As to the bill of the wife, upon the grounds that I have stated, I cannot give her the whole of the dividends But upon several cases, *Watkyns* v. *Watkyns*, (*a*) *Bond* v. *Simmons*, (*b*) *Colmer* v. *Colmer*, (*c*) *Sleech* v *Thorington*, (*d*) and the late case before Lord *Rosslyn*, *Bullock* v *Menzies*, (*e*) there is no difficulty in giving her the remainder for her separate use during the absence of her husband: supposing the fact proved, that he left her unprovided. That is not in evidence There must therefore be an inquiry, whether the husband lives abroad, and has made no provision for his wife

Upon the first bill decree according to the prayer, that out of the dividends the trustees are to reimburse the Plaintiff what he has paid; and that a sufficient portion is to be set apart to answer the accruing payments. As between the wife and the surety this is not a case for costs to fall upon her.

(*a*) p 25 2 *Atk* 96 (*b*) 2 *Atk* 20.
(*c*) *Mos* 121 Cited 2 *Atk*. 98 3 *Atk* 295 2 *Ves* 562
(*d*) 2 *Ves* 560 (*e*) *Ante*, vol. iv 798.

{(1) See *Scribner* v. *Hickok et al.* 4 Johns. Cha Rep. 530 See also 4 Johns Cha. Rep 130.}

1805.

April 6, 8, 9.

Ex parte STEPHENS.

Equitable set-off under circumstances, when there could be none at Law, viz Bankers directed to lay out money in Navy Annuities, not doing so, but representing, that they had, making entries and accounting for the dividends accordingly; and taking a joint promissory note from the party, the sister, and her brother, to secure a debt from him to them, upon which the Assignees under their Bankruptcy sued him alone. Order to prove for the balance, setting off the debt upon the note, an injunction, and delivery of the note (1)

IN 1785 *Ann Stephens* gave directions to *Castell* and *Powell*, her Bankers, to sell Exchequer Annuities, and to invest the produce in *5l. per cent* Navy Annuities in her name, and for her use. They informed her, they had followed her directions, and an entry, dated the 20th of *September*, 1785, was made in her Banker's book of 3320l. 11s. 11d. to her credit, as the produce of the Exchequer Annuities, and another entry, dated the 13th of *October*, debiting her with 3399l. 7s. 6d. as paid by them for the purchase of 3500l. Navy *5 per cent* Annuities, and from that time they regularly gave her credit for the dividends accordingly. Her brother *James Stephens*, having a separate account with the same bankers, in 1796 proposed to borrow from them 1000l. upon the security of the joint and several note of himself and his sister, which was agreed to, and the note given accordingly. *Castell* and *Powell* afterwards became Bankrupts; and it then appeared, that they had not purchased the Navy Annuities. The Assignees under the Commission having brought an action against *James Stephens* alone upon the note, this petition was presented by him and his sister; praying that the petitioners may be at liberty to set off what was due upon the note from the debt, due from the Bankrupts to *Ann Stephens*, that she may prove for the residue; that the note may be delivered up, and that the Assignees may be restrained from suing upon it.

Mr. Heald, for the Assignees, objected, first, that under these circumstances there was no right to set off; 2dly, That the fraud upon *Miss Stephens* by the Bankrupts could not be set up by her brother.

Mr. Romilly, and Mr. Hart, in support of the Petition.— It is not contended, that there could be a set-off at Law, the action being against *James Stephens* only: but your Lordship, sitting in Bankruptcy, will give the same relief, that would be administered in Equity, enabling them to make the set-off available. If the action had been brought against both, they might have pleaded separately; and each might have insisted upon a defence, that would have been a bar to the whole action. If instead of a note, a bond had been given, she might have pleaded payment, tender, accord, and satisfaction. What is the objection, where the debt is due from two to one? No one is injured. It is for the benefit of the co-debtor, being the

[* 25]

[(1) See *Duncan* v. *Lyon*, 3 Johns Cha Rep. 351. *Pitkin* v. *...* v. *Cooke*, 4 Johns Cha Rep. 11.]

1805. separate debt of both. Certainly it is different, where the debt is due to two, though there is a case, going a great deal further than this; a joint debt set off against a separate demand: *Ex parte Quintin*, (a) *Mitchell* v. *Oldfield*. (b) In this case, however, the debt being due from two to one, if the action had been against both, this debt might have been set off. But the action being against *James Stephens* alone, if *Miss Stephens* had filed a bill, a Court of Equity would not permit the action to proceed, if she chose to take it as a satisfaction in part. A Court of Equity would not permit them by bringing the action against him alone to avail themselves of such a transaction, leaving her to recover, as she could. Though he is the principal, they must be considered as joint-debtors. In this way she would by circuity pay to the Bankrupt's estate the money they owe her. She was induced to join in the security for her brother by the concealment, contrary to good faith, of her real situation. Upon this subject your Lordship exercises both a legal and equitable jurisdiction, frequently admitting proof of debts, upon which there could be no recovery at Law.

Ex parte STEPHENS.

[25]

April 3.

The LORD CHANCELLOR.—The case is, that these Bankers had received the money of this lady, produced by the sale of her Exchequer Annuities, and falsely and fraudulently assured her, they had laid it out in Navy Annuities, according to her directions at that time, and from half year to half year, until their failure, exhibiting to her a false and fraudulent document, as a proof that they had done so; the money in fact never having been laid out. The consequence is, that from the moment the money came to their hands they were debtors to her for that sum. The security, given by her for her brother in 1796, was given under the supposition, that she had stock standing in her name; that she was no creditor of those, to whom she was giving that security; but that they had the management of that stock of hers, accountable to her for the dividends half-yearly: they, at the time they took that security, knowing, they were then debtors to her for that sum, which they had not laid out, according to the fraudulent representation they made to her. She stood a debtor by this instrument upon the face of it; and, if they choose so to put it, in the character of surety for her brother.

(a) *Ante*, vol. iii. 248. See *Ex parte Christie*, *ante*, vol. x. 105. *Ex parte Twogood*, *post*. [p. 317.]
(b) 4 *Term Rep.* 123.

1805.

Ex parte STEPHENS.

The jurisdiction in Bankruptcy both legal and equitable.

The question upon the petition is treated as a question of set-off. But it is not here raised as a question of set-off in the strict and technical sense. The question upon the whole is, whether The *Chancellor*, exercising the jurisdiction in Bankruptcy, viz. both a legal and *equitable jurisdiction, can interpose against an action, brought by the Assignees, not against *Miss Stephens*, but against her brother, upon his note, as a several promissory note, who, not being a creditor upon them, clearly could not set off any debt joint or several in that action. The result is, that they shall recover from him the sum, for which they have the joint note of him and his sister, and that she must come in as a creditor for the whole sum of her money, received by the bankers, instead of the balance, for which she would have been creditor, if the Assignees had sued her, or arranged the account upon the principle of mutual debt and credit. As to the doctrine of set-off, it is not necessary to say much. The Court was in possession of it, as premised upon principles of Equity, long before the Law interfered. It is true, where the Court does not act upon natural Equity, going beyond the Statute (*a*) the construction of the Law is the same in Equity as at Law. But that does not affect the general doctrine upon natural Equity. So, as to mutual debt and credit, Equity must make the same construction as the Law: but both in Law and Equity that Statute, (*b*) enabling you to prove the balance of the account upon mutual credit, has gone much further than you could have gone, either in Law or Equity, before, as to set-off.

[* 27]

But in this case my ground is, that the contract was entered into by *Miss Stephens* in ignorance; and if not, I should make the same construction; for, as they had her money in their hands, as she was upon the face of the instrument a surety, it was against conscience to do any act as against her, which should prevent her having what was no more than the proper use of her own money, retaining her right to proceed against the person for her reimbursement, as far as she fairly could; and it was competent to her, if she had made the discovery immediately after the transaction on account of her brother, to have desired, that so much of the debt should be cancelled, and the difference paid; and to have said, she had a demand against her brother for the sum of 1000*l.* as paid to his use; also upon the Statute of mutual debts and credits; and they shall not be permitted to say, she shall not, if she chooses, pay the debt, when the consequence is,

[28]

(*a*) Stat. 2 *Geo.* II. c. 22. 8 *Geo.* II. c. 24. As to Bankrupts, Stat. 5 *Geo.* II. c. 30. s. 28.

(*b*) Stat. 5 *Geo.* II. c. 30. s. 28. See *James* v. *Kynnier*, *ante*, vol. v. 108.

1805. *Ex parte* STEPHENS.

that she loses her money, and they can call upon him. If she had this equity before the Bankruptcy, so she has it afterwards; and therefore she has a clear right to say, they shall hold 1000*l.* of her money in discharge of the note, and shall deliver up the note. The consequence is, they are prevented from suing upon the note by the clear demand of justice she has against them, and therefore they have no right to complain.

The order was, that the petitioner, *Ann Stephens*, be at liberty to set off the amount of the promissory note against the demand she has upon the Bankrupts on account of the sum of 3599*l.* 7*s.* 6*d.* charged as the sum invested in the purchase of 3500*l.* Navy 5 *per cent.* Annuities, that the promissory note be delivered up to her, as having paid the same, and, that she be admitted a creditor under the Commission for what shall appear due to her after such set off upon the balance of the account; and that the Assignees be restrained from suing the petitioners, or either of them, upon the note

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[29]

BURROUGHS *v.* ELTON.

Feb. 25, 26, 28. *March* 1, 25. *Ap.* 13.

Suit by a creditor against persons accountable to the estate allowed in a special case, as, where the representatives cannot, or will not act (1)

One object of the suit being the establishment of an agreement for carrying on a colliery, the Plaintiff must take it subject to all engagements as a continuing concern No security to be given for the result of the account Whether the Plaintiff being a creditor by judgment seventeen years old, can have a decree without putting himself in a situation to proceed at Law, viz. reviving by *scire facias*, Query The bill would be retained, that the debt might be substantiated by an issue, or other proceeding at Law

THE original bill was filed in 1798, by a creditor by judgment in 1781, of *James Weston*, deceased, on behalf of himself and all other creditors, &c, stating the death of *Weston*, and the Bankruptcy of his executor, the Defendant *Cooke:* that he never received any of the personal estate and papers of *Weston*, which were all possessed by his widow, and refuses to get in the personal estate: and praying, that a receiver may be appointed, and that the personal estate of *Weston* may be collected, and applied in payment of the debts.

In 1800 the Plaintiff filed a supplemental bill; stating the appointment of a receiver under an order in 1798; and that *Cooke* by his answer stated, that he had commenced a suit in the Ecclesiastical Court against the widow, but that she had absconded. By a decree, made on the 13th of *May*, 1800, in the original cause, it was

[(1) *Long* v *Majestre & Tardy*, 1 Johns. Cha Rep 505.]

ordered, that the Plaintiff should be at liberty to prosecute the suit in the Ecclesiastical Court, and that the receiver should be continued, and any of the parties were to be at liberty to apply. No further proceedings were had in that cause. 1805. BURROUGHS v. ELTON.

The supplemental bill further stated, that, the widow of *Weston* having absconded with the deeds and papers, the receiver had not been able to get in the personal estate; which, exclusive of *Weston*'s interest in the colliery, after-mentioned, will not be sufficient for the debts. In 1793, *Weston* was concerned with the Defendant *Elton* and *Richard Jenkins* in working and carrying on a colliery [30] at *Languern* in the County of *Glamorgan*: to which they were entitled, as to one moiety under a lease unexpired, and as to the other moiety, under an agreement for a lease for 21 years from *October*, 1787: *Jenkins* having also an interest in the reversion. In *December* 1793, *Weston* and *Elton* came to an agreement, that in case the share of *Jenkins* in the colliery, and his reversionary interest in it and the lands, under which the coals lay, should be purchased by them or either of them, it should be for their mutual benefit in equal shares. In 1794, *Weston* becoming embarrassed, was arrested; and *Elton*, who was then engaged in treaty with *Jenkins* for the purchase, formed a plan to obtain the whole benefit of the concern for himself; and with that view in 1795 charged *Weston* in execution upon a bond. *Elton* also agreed with the widow and heir of *Jenkins* for the relinquishment and sale of his interest in the colliery, and the moiety of the reversion, and he procured another lease of the other moiety. *Weston* died in prison in 1798.

The bill, further stating, that *Weston*'s affairs were considered desperate, and the Plaintiff did not find out his heir at law, the Defendant *Heush*, till lately, who from ignorance of his right, or conceiving, that the creditors will exhaust the effects, or in collusion with *Elton*, to disappoint the specialty creditors, has not taken any steps, and refuses to join in the suit, and, that *Cooke*, having been compelled by the Plaintiff to prove the will, refused to act further, charged combination between the Defendants *Elton*, *Cooke*, and *Heush*, and prayed an account of all dealings and transactions between *Weston* and *Elton* respecting the colliery, upon the footing of the last settled accounts, and the receipts and payments of *Elton*, as well during the former lease, as since he has been in possession [31] under a new agreement with the owners, and of the consideration paid by him for such agreement; and that what shall be found due from him to the estate of *Weston* may be applied in payment of his debts; and that the agreement of *December*, 1793, may be specifically per-

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formed; the Plaintiff offering to pay to *Elton* on performance thereof such sum, if any, as shall appear to remain due to him from *Weston* on account of the consideration and expenses in case his personal estate shall not be sufficient, and that such interest as the real or personal representatives of *Weston* may be entitled to under the agreement may be sold, and the produce applied, 1st, to repay the Plaintiff such sums as he may be obliged to advance for the performance of the agreement, and the residue in payment of the Plaintiff and the other creditors; or, that in case the agreement ought not to be performed, and the Court should be of opinion, that *Elton* has not taken such new interest as he obtained in the colliery for the use of the partnership between him and *Weston*, then an account, &c. during the continuance of the partnership.

The Defendant *Elton* by his answer claimed under a new lease obtained by him in 1797; denied all fraud; and submitted, that he is not bound to perform the agreement between himself and *Weston*; but if he is, then, as *Weston* never paid or offered to pay any part of the purchase-money, or to reimburse the expense, the Defendant ought, not only to retain the possession for his own use, but to take all the profits, till all sums due from *Weston's* estate, with interest, shall be paid; and insisted, that the Plaintiff has not any right, as a creditor of *Weston*, to call for the account of his receipts from the colliery, &c.

Mr. Romilly, for the Defendant Elton, insisted, that a bill of this nature cannot be maintained by a creditor; and that under the circumstances in which *Weston* stood, the partnership must be considered as dissolved previously to his death.

Mr. Richards, and Mr. Bell, for the Plaintiff, and Mr. Hanshaw, for a Defendant in the same Interest, contended, that this case is not within *Utterson* v. *Mair*,(a) *Elmsely* v. *M'Aulay*,(b) and the other cases of that class, but is the special case, referred to in *Berkley* v. *Dorrington*, cited by The Lord *Chancellor* in *Alsager* v. *Rowley*,(c) from Lord *Hardwicke's* note; that before the death of *Weston* there could be no dissolution of the partnership, by insolvency, imprisonment, &c. and formerly it was doubted whether even lunacy would have that effect. At what stage of his imprisonment can it be said, that the dissolution was complete?

February 26.

The Lord CHANCELLOR expressed doubt, whether the judgment, upon which the Plaintiff's suit was founded,

(a) *Ante*, vol. ii. 95. (b) 3 *Bro. C. C.* 624.
(c) *Ante*, vol. vi. 748. See the references in the note, *ante*, vol. vi. 749.

was sufficient to sustain it, being above twenty years old, not revived, and proved by the production of the office copy; observing, that at Law such a judgment must be revived by *scire facias*. His Lordship added, that upon the question, whether the party, going in before the Master upon such a judgment, will be allowed his debt without revivor, though he could not proceed at Law, he had directed an inquiry into the usage of the Masters. 1805. BENNINGTON v. ELTON.

Mr. Bell mentioned *Stileman* v. *Ashdown* (a) [illegible]. [33]

The Lord CHANCELLOR.—I have looked at the case of *Stileman* v. *Ashdown*; and *Mr. Brown* represents Lord *Hardwicke* to have stated, that, where one judgment creditor sues for satisfaction of his own debt against real assets, this Court will give him no other execution than precisely what he would have had at Law, viz. against a moiety. Then how do I know there is any other judgment or specialty creditor, in which case there may be a different kind of satisfaction.

Upon inquiry from the Masters, as to the proof they require, it appeared, that the creditors bring the office copies of their judgments; but the Master is not satisfied with that, but also makes them prove by affidavit, that their debts remain due. That cannot be done on the part of the creditor, who is the Plaintiff in the cause.

Mr. Bell, for the Plaintiff, cited *Hammond* v. *Wood*[illegible] case, (b) 20th October, 1730, from the Register's book, stating, that it was a bill to make effectual a judgment against the real estate in the hands of the heir, which was very much discussed; that the copy of the judgment was read: but it does not appear, from the statement of the bill, that any thing more was done; and no notice is taken of a *scire facias*. The date of the judgment was 1703. In *Stileman* v. *Ashdown* (c) no copy of the judgment appears to have been read. Nothing is stated but, that there was such an existing judgment; and there is no appearance of a revivor. In this case it is impossible that the judgment can be revived. The *scire facias* is given by the Statute, (d) and the heir is brought before the Court as terre-tenant merely; and if the *scire facias* is brought against him, he must plead *riens per descent*. [34]

(a) 2 Atk. 477. 608. Amb. 13. (b) Fitz. 141. Sel. Ca. Ch. 80.
(c) 2 Atk. 477. 608. Amb. 13.
(d) p. 34. Stat. Westm. 2. 13 Ed. I. c. 45.

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ELTON.
March 25.

The Lord CHANCELLOR.—The first question in this case is, whether, if *Weston*, or upon his death his representatives, had been Plaintiffs, attending to the facts, they would have had a right to consider *Elton* with regard to so much of the inheritance as he possessed, and the renewed lease, taken in 1797, as a trustee of the interest acquired, and accountable for the estate accordingly

Elton and *Weston*, jointly concerned, having executed this agreement with a view to a further interest, will be liable to be considered as joint purchasers, according to their advances. *Weston* having got into distress, and continued in distress, the question is, whether it is possible, as against his real and personal representatives, to say, they are not entitled to any relief. First, down to 1796 they had an interest, as owners, of one of the leases, also under an agreement for another, and as to the agreement, they were to be joint purchasers under the circumstances.

The next question is, if *Elton* would have been a trustee for the heir and personal representatives of *Weston*, is it competent to a creditor, viewing the property, which [35] would be acquired under such a declaration of trust, as amenable to the payment of debts, to file a bill to have that property brought into the mass of *Weston*'s effects, in order to have the debts satisfied The case, as between the heir and executor, admits this consideration. The executor would have an interest, if that can be represented as personal estate. The heir, subject to the demands of creditors, would be entitled to an interest in the inheritance, according to the true construction of the agreement The executor has become Bankrupt, is insolvent; thinks he has no interest to pursue in bringing the personal estate into the fund for payment of the debts, and has not the means. The question then is, whether, if that personal interest can be considered part of the effects, a creditor may not be permitted to sue, to have those effects duly administered I do not consider the objection upon the circumstance, that he is a judgment creditor, or upon the particular form of the bill; but upon the case, where the situation of the executor is so destitute, that he cannot exercise the functions of an executor, and is insolvent, whether the Court will permit a creditor to bring a bill for himself, and to have administration.

The heir stands under a different consideration. He does not say, whether he claims any benefit with respect to the inheritance He seems to say, the Plaintiff may sue, and if he sues effectually, for the purpose of making this part of the property of *Weston*, and it shall be for the benefit of the heir to take the inheritance, he will take to it.

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v.
ELTON

But he declines to decide until he sees the result of the suit. He therefore, like the executor, will not maintain his rights. The executor neither can, nor will. The point as to the judgment creditor, as far as respects the real estate, must be maintained upon this, that the heir will not stir; and if the creditor cannot proceed, the property cannot be amenable to the debts. In that state, generally speaking, a creditor ought to be permitted to sue [*36]

It is next said, this judgment creditor cannot be permitted to sue; for his judgment is 17 years old at least; and no step has been taken to revive the judgment. There is great difficulty as to that. In general cases, as I understand the practice, judgment creditors go into the Master's office, judgment creditors, in general, who cannot stir at Law without a *scire facias*, go, and prove before the Master with the creditors without such a step, but sustaining their proof by the ordinary course, giving in evidence the record of the judgment, and swearing, that the debt is due. That is a course the Plaintiff in the cause clearly cannot take. Whether coming for his own debt, or on behalf of himself and other creditors, he is bound, in order to obtain a decree, to prove his case, and of course he cannot prove by his own affidavit that fact. that a judgment creditor, going into the Master's office, does prove by affidavit; but he must make himself out to be a judgment creditor by evidence, strictly speaking, and such as he has a right to proceed upon. In ordinary cases you ought to prove; so that it will appear you have a right to go on at Law.

Though a judgment creditor cannot sue at law without a *scire facias*, before the Master it is sufficient to produce the record of the judgment, and swear the debt is due.

I have not found any record, in which, where a judgment creditor sued, whose judgment was so old, that at Law he was bound to take some step, even against the debtor himself, but especially against his representatives after his death, any such entry is made of the proceeding, necessary at Law to revive the judgment. The question comes to this, supposing this a case, in which the judgment creditor could do any thing useful by taking out a *scire facias* at Law, whether the Court would turn him round; or retain the bill, either to give him an opportunity of trying an issue, whether the debt is yet due, or [37] of substantiating that by a proceeding at Law, if necessary: at any rate the bill is not to be dismissed upon such a suggestion as this. That the judgment may be above 20 years old, and the money still due, is unquestionable; for it is a point of presumption. In *Constantine* v. *Fly* (a) the judgment was above 20 years old; and in *Roe* v. *Bant* (b) the bill was retained, with liberty to revive the judgment in an action.

(a) 2 *W. Black. Rep.* 995. (b) 1 *Dick.* 150

1805. Bushby *v.* Ellon ... Another question may arise, where perhaps the equity of the Court would get at a fund to pay the debt; and where it would be very difficult for the creditor to proceed with any effect at Law, for property may be so circumstanced, that there could be no execution except in Equity, and, if nothing effectual could be done at Law, and this Court could direct an issue, I am not prepared to say, this Court would not give relief out of the assets, so peculiarly circumstanced. I think, I found a case, in which such an issue had been directed.

The next question is very material, supposing a person, having an interest in a concern, entitled to have his interest declared, to have stood by, or not, till an enormous expenditure was incurred in bringing the concern to a good bearing, if I may so express it, and that the concern itself must be ruined, unless permitted to go on, at considerable risk, but with a considerable prospect of profit, upon what term [illegible] relief ought to be given. The heir says, [illegible] what has been the expenditure, what engagements [illegible] been entered into, independent of those [illegible] bring it to its present state, and the situation [illegible] future [illegible] he will determine whether to [illegible] The judgment creditor on the other [illegible], he is ready to do all this. There is a [illegible] between the Defendant, who has actually expended [illegible] money, and is out of pocket the whole of [illegible] all the liabilities incident to such [illegible] saying, all the security [illegible] for standing in the shoes of a partner [illegible] to do so. My doubt upon such a case is, whether if the decree is to be made, there [illegible] securities on both sides, that he who prays, and he who resists, the account, should mutually [illegible] securities to answer the result of the account [illegible] consistently with the practice. But I do not know a case, in which the Court has imposed such terms upon a Plaintiff. If he will have the benefit of the concern he must take it with all its engagements, and submit to have it treated, as it ought to be, not only for his benefit, but for the benefit of all the persons embarked in it. It would be most mischievous to determine, that a Plaintiff, seeking the benefit of a lead-mine, colliery, &c. though the whole establishment was formed upon the principle, that it was to go through a species of trade for a time, the interest acquired with a view of carrying it on as a trading concern, shall put an end to it.

I should think, the heir at law must at this moment elect, whether to take an interest or not: for if he does not mean to do so, nor the executor, it is clear, the cre-

-ditors could not stand in this concern further than the amount of the payment of their debts. They must choose whether to take a part in this concern or relinquish it. The executor also is bound to say, whether he will or not: the principle of the decree being, that the Plaintiffs are to be paid as creditors. They cannot contend beyond that

1805.
B[illegible] v. Eyton.

Mr Bell, for the Plaintiff, upon the last observation said, that a judgment-creditor may go further than merely to desire payment of his debt, as he may redeem a mortgage. The Lord Chancellor replied, that the relief sought by this bill was confined to payment of the debts.

[*39]

The cause was ordered to stand over for the heir and executor to make their determination.

The Lord Chancellor [illegible] I [illegible] no precedent of security ordered to be given by the Plaintiff for the result of the account. But principles of natural justice require it in many instances. [illegible] no precedent, I hesitate to make one. There is no case resembling this in circumstances, but there [illegible] in which natural justice [illegible] circumstances as this [illegible]

April [illegible].

As to the other points I [illegible] given my opinion except how far this Plaintiff [illegible] in the concern, and subject to the obligations of a partner, and I think, he must be so [illegible]

WRIGHT v. BOND.

March [illegible].

THE bill was filed to obtain the specific performance of a contract for the purchase of an estate by the Defendant; who by his answer submitted to perform the contract, if a good title can be made, asserting, that upon the abstract a good title cannot be made.

Mr. Romilly, for the Plaintiff, moved for a reference to the Master, to inquire, whether a good title can be made; and, whether it appears upon the abstract, that a good title can be made. The Defendant not appearing, an affidavit of service was read.

After answer, submitting to perform the contract, if a good title can be made, reference directed on motion, whether a good title can be made, and whether it appears upon the abstract.

[*40]

1805.

Whitmore v. Bond.

The Lord CHANCELLOR made the order; observing, that he should have doubted upon it fifteen years ago; but must grant it now upon a variety of precedents. (a)

(a) *Moore* v. *Matthews, ante,* vol. iii. 273.

April 30.

Ex parte GARDNER.

Proof by the widow of a Bankrupt, under an engagement by the marriage settlement to settle money; which he falsely represented himself to possess.

BY a settlement, executed in 1794, previous to the marriage of *William Gardner*, reciting, that he had 1000*l.* and upwards then employed in his trade, it was agreed, that 500*l.* part thereof should be vested in trustees, upon trust for the separate use of the wife for life; and after her decease for *William Gardner*, surviving for life; and after the decease of both for the children; and in default of children to pay the same to the survivor of *Gardner* and his wife.

The representation by the settlement of the circumstances of *Gardner* was unfounded; and the money was never paid. In 1797 *Gardner* became a Bankrupt; and he died in 1801, leaving his widow surviving, but no children. The petition was presented by the widow, to be admitted to prove the sum of 500*l.* as a debt under the Commission.

[41]

Mr. Romilly, in support of the Petition. *Mr. Richards*, for the Assignees.

The Lord CHANCELLOR said, upon the case of *Montefiori* v. *Montefiori*, (a) and many others, the husband was bound to make good the representation by his marriage settlement, and made the order, directing it to be recited, that it appeared, the representation by the settlement was false at the time it was made; and, the marriage being had upon the faith of that representation, declaring, that the petitioner is a creditor for 500*l.* &c.

(a) 1 *W. Black. Rep.* 363.

1805.

April 30.

TAYLOR v MILNER.

The MASTER *of the* ROLLS *for The Lord* CHANCELLOR.

IN consequence of the decision with respect to the demurrer (*b*) the Plaintiff moved for the production of letters mentioned in a schedule to the answer.

Defendant, though perhaps he might have objected to answer, having answered, compelled to make a full disclosure. (1)

Mr. Richards, and Mr. Johnson, for the Defendant Wheeler, resisted the motion, on the same ground, upon which the Defendant had demurred; insisting, upon *The Marquis of Donegal v. Stewart*, (*c*) and *Phillips* v *Carew*, (*d*) that, though the Defendant had answered, he might resist answering further. They also observed, that these letters were confidential.

Mr. Romilly, and Mr. Hall, in support of the Motion, contended, that those particular cases, which were to be considered rather as exceptions out of the general rule, [* 42] could not protect a Defendant from answering fully as to that which he had submitted to answer.

The Master of the Rolls.—If the question now were, whether the Defendant should answer at all, the objection would deserve great consideration. But it is too late now to argue, whether upon the case made by this bill the Plaintiff is entitled to a discovery, or not; for there is no difference, whether the Court has determined, that the bill is such as the Defendant must answer, or, whether the Defendant has by his own conduct precluded himself from raising that question. It is now determined, that this Defendant must answer. That he must answer fully is a necessary consequence. I take it to have been determined, that, if a person, who is only a witness, submits to answer, he must answer fully (*a*). This case is different in its principle from those of a total denial of title; where the Defendant has not been compelled to give that discovery, which was merely consequential. But this Plaintiff comes for a discovery of all facts and circumstances relative to this transaction, alleging, that, if fully disclosed, they will lay the foundation of an ac-

(*b*) See *Taylor* v *Milner, ante*, vol. x. 444. (*c*) *Ante*, vol. iii. 446.
(*d*) *Ante*, vol. iv. 107.
(*a*) p. 42. See *ante*, vol. vii. 288, in *Fenton* v. *Hughes*, the opposite opinions of Lord *Thurlow* and Lord *Kenyon* upon this point. From some cases, that have since occurred, the general question, whether a Defendant can by answer decline to give a full answer, appears to be still unsettled. (2) *Dolder* v. *Lord Huntingfield*, *Faulder* v *Stuart*, *post*. {p. 283, 296.}

{(1) See *Methodist Episc. Church* v. *Jaques*, 1 Johns. Cha. Rep. 65.}
{(2) See 1 Johns. Cha. Rep. 74.}

1805. HERVEY v. The Marquis of DONEGAL. [46]

forty days, if the prorogation extends beyond eighty days. The difficulty of restraining a subject from going to any part of the United Kingdom applies with as much force to *Scotland*: but there is authority for that case.(*a*) The difficulty, arising from the privilege of Parliament, may be modified, so as to remove the objection; as in the instance of an injunction against a member of Parliament, accompanied by a direction, that the attachment shall not go; and in *Ex parte Wallop*(*a*) the writ *de ventre inspiciendo* issued, but was ordered to be kept in the office fourteen days, to give the object an opportunity to prevent the application of it by submitting to examination. The case of a person returning home is with reference to the nature of the original debt, as property to be recovered there (*b*)

Ne exeat regno to restrain going to *Scotland*.

The Lord CHANCELLOR.—Upon this writ the law has settled the form, and this Court has no authority to alter the form In the *Scotch* cases(*c*) the construction was, that the party was going towards foreign parts, in the language of the writ, if he went out of the jurisdiction; and, the writ having existed, when *Scotland* was to all intents and purposes foreign parts, the union did not mean to alter for this purpose what had before been considered foreign parts. The question then is, whether going to *Ireland* is going to foreign parts; considering the original object of the writ itself; which is to prevent a subject going to the King's enemies. Many very hard cases have occurred of persons living in the *West Indies*, caught here by the writ (*d*) I contended upon the hardship before Lord *Thurlow*, who granted the writ, as it had been granted, but I do not believe he would have begun. The Court of *Exchequer* grant orders in the nature of this writ, applying them only to cases to which this * Court would apply the writ The difficulty is, that this state writ has never been applied to such a case; though the occasion for the application must frequently have existed. The case of *Scotch* members is perhaps attended with full as much inconvenience, considering the difference of jurisdiction in that country: and that the jurisdiction in *Ireland* is the same as here. So, as to members, living in the northern counties, the application has never been made, if during the time of privilege they went on into *Scotland*.

Original object of the writ of *Ne exeat regno* to prevent a subject going to the King's enemies.

The Court of *Exchequer* grant orders in nature of the writ of *Ne exeat regno*, applying them only to cases, to which this Court would apply the writ.*

[* 47]

(*a*) *Done's* case, 1 *P. Will* 263 *Wilson* v. *Boswell*, 2 *Dick* 535 See *Hunter* v *Macculloch For* 136

(*a*) [illegible] *Bro C C* 96

(*b*) *Robertson* v *Wilkie*, *Amb* 177 *Leonard* v. *Atkinson*, 3 *Bro. C. C* 218. *Roddam* v *Hetherington*, *ante*, vol. v 91.

(*c*) *Done's* case, 1 *P Wms* 262 *Wilson* v. *Boswell*, 2 *Dick* 535. *Hunter* v *Macculloch*, *For*. 136 (*d*) *Leonard* v. *Atkinson*, 3 *Bro C. C.* 218.

As to the second part of this application, there is no authority for granting a sequestration in the first instance; and, if not, the practice, which is the law of the Court, cannot be altered. 1805. Bertie v. The Marquis of Donegal.

It is much better to remedy this case by Act of Parliament, than by stretching these writs to cases, to which they were never intended to apply; the Court acting upon the particular mischief, with a doubt whether they are acting upon a due administration of the Law. By the late Act of Parliament,(a) authorizing the Courts of the two countries to assist each other, you may sue upon the decree as upon a judgment. You had better go to Parliament upon this.

No order was made.

(a) Stat. 45 Geo. III. c. 90.

LOMAX v. LOMAX.

[48] 1805. May 4.

A PETITION was presented for maintenance out of the interest of a legacy to the children of the testator's daughter, when the youngest should attain the age of 21.

Maintenance out of interest of a legacy to grandchildren, when the youngest should attain 21, refused.

Mr. Hart, in support of the Petition.

The Lord CHANCELLOR.—Upon a legacy, when they shall attain 21, and to such of them as shall attain 21, is not the meaning, that such as do attain 21 shall have it at that time; and what right has the Court to give the interest before that time? If all die under 21, and a child, not yet in existence, should come into existence, and attain that age, that child clearly would take the whole, interest as well as principal. Therefore I may give it to these children, who may never become entitled to it. In the case of Sir *Frederick Eden's* children I refused to increase the maintenance, or even to continue it, under an order made by Lord *Rosslyn*.

The application was renewed; but The Lord *Chancellor* refused it; saying, the interest could not be given for maintenance in the face of the will.(a) May 4.

(a) See *Greenwell* v. *Greenwell*, ante, vol. v. 194, and the cases stated in the notes; [illegible] v. *Blackstone*, ante, vol. ix. [illegible] [illegible] v. *Green*, ante, vol. x. 45. In *Ex parte Kebble*, March 1805, though the question was not decided, these cases were not approved by The Lord Chancellor. In *Mole* v. *Mole*, 1 *Dick.* 310, Sir *T. Clarke*, M.R. [illegible] a legacy by a parent.

1805.

Feb. 9.
March 11.
May 16.

Affidavit, that the Defendant is not worth more than 5l. except the matters in question, will not entitle him to defend *in formâ pauperis*. On that ground he was dispaupered.

SPENCER *v.* BRYANT.

THE object of the bill was the specific performance of an agreement by the Defendant to sell a small cottage, of which the Defendant was in possession, to the Plaintiff. The Defendant obtained an order to defend *in formâ pauperis*; for that purpose stating by affidavit, that he is not worth more than 5*l.* except the matters in question.

Mr. Raspell, moved, that the Defendant should be dispaupered; citing the passage in *The Practical Register*, (*a*) that if at any time it is made appear to the Court that a party, admitted *in formâ pauperis*, is of such ability, that he ought not to be *in formâ pauperis*, the Court will dispauper him: therefore, where it was shown the Court that the pauper was in possession of the land in question, the Court ordered him to be dispaupered; though the Defendant had a verdict at Law, and might take out a writ of possession.

Mr. Hart, *for the Defendant*, relied on the very inconsiderable value of the premises; a little cottage; the Defendant paying a shilling a week from his income for rent. Such a property cannot affect the ground of the privilege; which is, that, unless the party is permitted to sue or defend in this form, he cannot prosecute his right. This case cannot be considered a fraud upon the rule.

[50]

The Lord CHANCELLOR.—Except the passage, that has been cited from the *Practical Register*, I can find nothing, that applies to this case. My opinion is rather with the Plaintiff; the point made by the Defendant being directly in opposition to that *dictum*. How am I to draw the line? For this purpose I must say, all under 5*l.* are poor, and all above that sum are rich. Is the Court to go upon the nature of the subject, and the consideration of the circumstances of each individual, in different cases? If not, there is no medium, upon the terms of the affidavit, between a pauper and the richest duke in the kingdom; who, if the exception of the estate in question is sufficient, might apply as a pauper.

1806. January 28.

The Lord CHANCELLOR, under the circumstances of this case, recommended a compromise, which failed; and afterwards the order was made.

(*a*) Prac. Reg. Ed. by Mr. Wyatt, 320, 321.

PEMBERTON v. PEMBERTON.

IN this cause an issue, *devisavit vel non*, having been directed at the Rolls, a verdict was obtained in favour of the will. A motion for a new trial had been granted by The Lord *Chancellor*. The second verdict was also in favour of the will. Upon another application to The Lord *Chancellor* for a new trial the objection was taken that, the issue having been directed at the Rolls, the motion for a new trial could not be made before The Lord *Chancellor*.

Issue directed at the Rolls, a motion for a new trial may be made before The Lord Chancellor.

Mr. Richards, and Mr. Benyon, in support of the Motion, insisted, that according to the practice the application might be made either before his Lordship or at the Rolls, observing, that the issue was directed at the Rolls of course, without any argument, and *The Master of the Rolls* therefore could not know any more of the circumstances than any other Judge. They referred to *Mountain v. Bennet*, (a) in which, an issue having been directed at the Rolls, *devisavit vel non*, Lord *Thurlow* granted a new trial. [51]

Mr. Romilly, and Mr. Hart, for the Devisee, opposed the motion.

This question is very important: whether an issue having been directed at the Rolls, to ascertain a fact, an application for a new trial ought to be made to the Judge, who directed the issue, or to any other Judge; for the rule must be general, without any distinction between an issue, *devisavit vel non*, and any other fact. Applications of this sort are so infrequent, that the Court must regard the principle alone. The few instances, that can be referred to, passed without opposition and without notice. As to the principle, a motion for a new trial must always, except in the instance of an issue, be made in the Court in which the action is brought; and in that instance it is essential, that the Judge, who had doubt, and who wished for better information, should have the opportunity of acquiring better information. Your Lordship cannot know whether the conscience of *The Master of the Rolls* is satisfied. The avowed object is the unconstitutional object of avoiding an appeal to your Lordship. Is it to depend upon the party, whether there is to be an appeal? To obviate that, your Lordship may have the assistance of *The Master of the Rolls*: but that is open to the objection, that the case will not be twice discussed, and in the second instance with the advantage of having [52]

(a) In Chancery, 1784.

1805.

PEMBERTON v. PEMBERTON

the impression of the Judge, by whom it was first decided. The party may appeal, not only from an order, refusing a new trial, but also from the original order, directing the issue. That right is precluded, if your Lordship takes cognisance of that, directing a second trial, which must be upon the ground, that the original order, directing an issue, was right. Suppose an issue directed at the Rolls, and an application for a new trial refused by The Lord *Chancellor*, and the cause is set down at the Rolls upon the Equity reserved: *The Master of the Rolls* may say, his conscience is not satisfied, and the effect must be to make *The Master of the Rolls* a Judge of appeal from The Lord *Chancellor*.

Mr. Richards, in Reply, observed, that there is no doubt motions in causes, directed at the Rolls, may be made before The Lord *Chancellor*; and as to the objection, that the right of appeal would be abridged, that is the effect of the undoubted right to set down the cause before The Lord *Chancellor* in the first instance.

The Lord CHANCELLOR.—If you insist upon making this motion here, I cannot refuse it. The ground is this. It is obvious, that, where a cause is heard upon evidence and the Judge is of opinion that he ought not to collect the inference, but it ought to be collected by a jury, convenience requires, that, if the Judge, who directed the issue, should remain, the application for a new trial should be made to him. The principle is, that upon the motion for a new trial the Judge in Equity may look, not only at the report, but at the record in the suit in Equity, and may collect from the whole what may satisfy his conscience; and if upon the whole he is satisfied that justice has been done, though he may think, some evidence was improperly rejected at Law, he is at liberty to refuse a trial. Upon that ground I decided the case of *The Warden and Minor Canons of St Paul's* v. *Morris*. (a) But is that more than a rule of convenience? As to that the real principle is, that the Court is always the same. It may happen, that after an issue directed by The Lord *Chancellor* the same person may not have the Great Seal, when the cause comes back upon the Equity reserved. The motion before another Lord *Chancellor* will not be properly discussed, unless by the discussion he is put in possession of all his predecessor knew in the cause. In many cases it is not of much consequence; for upon the issue, *devisavit vel non*, which must be granted, the Court seldom does more than enter the evidence as read; which is scarcely looked at, until the motion for a new trial is

Discretion to refuse a new trial on an issue, if justice has been done upon the whole, though some evidence may have been improperly rejected at Law.

[*53]

A will never set aside without an issue, *devisavit vel non*.

(a) *Ante*, vol. ix. 155.

PEMBERTON v. PEMBERTON.

made. It is very inconvenient to hear a cause for further directions, or upon the Equity reserved, not before the same Judge, who heard it originally. Lord *Alvanley* struggled against that as much as possible. But the complaint proves, that the strict course of the Court, if insisted upon, gave occasion for that complaint.

Therefore strictly I do not apprehend I can refuse to entertain this motion. In the particular case too I have unfortunately made one order, certainly not apprised, that *The Master of the Rolls* had directed the issue. Notwithstanding that circumstance, if there was any particular discussion, I should recommend, that it should be carried back to the * Rolls, but upon merely granting the issue, *devisavit vel non*, there is no convenience in that.

A cause may be set down for further directions, or upon the Equity reserved, before the Lord Chancellor, or The Master of the Rolls, without regard to the circumstance, where it was heard originally.

[* 54]

The motion was accordingly heard by The Lord *Chancellor*, and a new trial was granted.

HANNAY v. M'ENTIRE.

May 16, 20.

UPON a motion that a writ of *Ne exeat regno* should issue, the affidavit stated the intention of the Defendant to quit the kingdom upon information and belief only. The debt was the balance of a partnership account.

The Lord CHANCELLOR.—I doubt, whether information and belief of the intention to quit the kingdom is sufficient, without some one swearing, he has heard the Defendant declare that intention. If the affidavit is presenting belief upon information, the Court should know the particulars of that information. The person, giving the information, can state the ground of it. In the case of waste it is not sufficient to swear, you are credibly informed, the Defendant intends to commit waste. You must either prove, he had laid the axe to the root, or some person must swear, he threatened to do it. This is the more necessary in this case, as it is only on the ground, that this is a case of account, that the Plaintiff is entitled to the writ. Suppose the simple case of one debt of 300*l* at the close of a partnership, consisting of three persons, due to the partnership, and received by one

To obtain a writ of *Ne exeat regno*, affidavit to information and belief of an intention to quit the kingdom, or circumstances, making it necessary, as an order for military officers to join their regiments abroad, not sufficient. (1)

In the case of waste, it is not sufficient to swear to information of the intention. The affidavit must go either to an act or threats. In account the writ of *Ne exeat regno* granted, though bail might be had at Law.

[(1) See the note to *De Carriere* v. *De Calonne*, ante, vol. iv. 577.]

1805. HANNAY v. M'ENTIRE. partner; another might * hold him to bail for 100*l.*: but I believe an account, though bail might be had at Law, this Court does grant the writ. The doubt in this case is upon the affidavit.

[* 55]

Mr. Thomson, in support of the Motion, said, the writ had been granted upon such an affidavit, and referred to *Russell* v. *Ashby*, (*a*) in which case Lord *Rosslyn* said, (*b*) that as to the purpose of going abroad it can be sworn to only upon belief, not positively, as it is only swearing to intention.

Mr. Leach, (amicus curiæ,) reminded The Lord *Chancellor*, that his Lordship had taken this objection in *Fitches* v. *Lance*. (*c*)

The Lord CHANCELLOR.—This Court formerly granted this writ very tenderly: much more so when I first came into it than since. It is a most dreadful weapon, by which a malicious man may expose another, who has no intention of doing wrong, to great vexation. The case of *Russell* v. *Ashby* (*d*) was very strong; particularly with reference to bail. I do not know, that this Court is to go the length of granting this writ merely because a Judge at chambers would order bail; as to which there is this distinction between the Courts of Law. The Court of King's Bench will not hear any thing against the affidavit, (*e*) even if the affidavit is to a debt of 500,000*l.*, which it is impossible to suppose could be due between the parties. The Court * of Common Pleas, on the contrary, hear affidavits in explanation, and set themselves right, if they are wrong. (*a*)

The Court of King's Bench will not hear any thing against the affidavit to hold to bail. The Court of Common Pleas hear affidavits in explanation.

[* 56]

May 20.

A supplemental affidavit was produced by the Plaintiff, stating, that the Defendant is an officer in the service of the *East India* Company, and that the deponent is informed, that there is a general order for all their military officers to join.

The Lord CHANCELLOR.—The defect of this affidavit is, that it leaves the fact of the order to join upon information. It may be true, that the deponent has received

(*a*) *Ante*, vol. v. 96. (*b*) *Ante*, vol. v. 99.
(*c*) *Ante*, vol. viii. 417. (*d*) *Ante*, vol. v. 96.
(*e*) *Pearson* v. *Haskins*, 1 *Wils.* 335.
(*a*) p. 56. In the Court of Common Pleas affidavits are admitted on both sides. See 1 *Burr.* 66. 2 *Burnes*, 58. 81. 84. 2 *Black.* 850.

such information, and yet such order may not have been made; and if there is such an order, there may be exceptions. 1805. HANNAY v. M'LAIRE

Mr. Romilly now appeared to oppose the motion, stating, that the Defendant had just returned from India, and had no intention of quitting the kingdom.

No order was made. (b)

(b) See ante, vol viii 597, in Jersak v. Buckley, and the cases ...

MORICE v. THE BISHOP OF DURHAM [57] May 25. June 17. 21.

Biddings not opened after confirmation of the report, unless fraud in the purchaser, or fraudulent negligence in another person, as the agent; of which it would be against conscience that the purchaser should take advantage; or, unless some particular principle arises out of the character of the purchaser, as connected with the ownership of the estate, or some trust or confidence, or his conduct in obtaining the report.

MR. BELL moved to open biddings, after the confirmation of the report. The only reason alleged for not applying sooner was, that the party understood another person had given a notice of motion for the same purpose; that, when that was discovered to be a mistake, the application was made, immediately after the confirmation of the report, and therefore no injury or inconvenience could arise.

Mr. Cooke, for the Purchaser, opposed the motion, insisting, upon the authority of Scott v. Nesbit, (a) that a bidding shall not be opened after confirmation of the report; and observing, that Watson v. Birch (b) was determined upon very particular circumstances, and in Gower v. Gower (c) fraud was imputed.

The Lord CHANCELLOR expressed strong disapprobation of the decision in Watson v. Birch; observing, that he never would have made those orders; and the only case in which the biddings can be opened after confirmation of the report, is, where there is some fraud or misconduct in the purchaser, or fraudulent negligence in another person, as the agent, of which it is against conscience that the purchaser should take advantage.

June 21.

The Lord CHANCELLOR.—My opinion is, that after a purchaser has confirmed his report, unless some particu-

(a) 3 Bro. C. C. 475. (b) Ante, vol. ii. 51.
(c) Cited in Watson v. Birch, ante, vol. ii. 51.

1805.
Mosley
v.
The Bishop of Durham.
[* 58]

lar principle arises out of * his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened. In this particular case I lament it: but there is much less mischief in abiding by the rule, than in permitting myself to depart from it upon what are called special circumstances, not connected with this view of the case.

No order was made.

May 14. 20.

ROCKE v. HART (1).

Executor charged for withholding money and not putting in his examination, with interest; but not beyond the general rate of the Court, viz. 4 per cent. and costs. Five per cent. in some cases beyond mere negligence, is necessary; as, that he employed the money in his trade. (2)

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THE Plaintiff pressed for interest at the rate of 5*l. per cent.* against the assets of an executor, deceased, on account of withholding money in his hands, having in 1787 gone to the *East Indies* without putting in his examination, being then in contempt. He died in 1803.

Mr. Fonblanque, and *Mr. Heald*, for the *Plaintiff*.—Four *per cent.* has not been the rate of interest for the last twenty years (*a*). In *Forbes* v. *Ross*, (*b*) and *Treves* v. *Townshend* (*c*) interest at the rate of 5*l. per cent.* was given. The duty to make the most of the fund, though not expressed, as in that case, is implied. No blame was to be imputed to the Defendant, as in this instance. This is not the case of one trustee lending the money * to another, but a trustee, with complete power over the fund, guilty of a breach of trust for several years, withholding it from a due application, which might have saved 5 *per cent.* The money withheld must be considered as used, unless the contrary is proved; the proof being thrown upon the trustee, that he had secured it in such a way as to place it out of his power. There is no distinction for this purpose between a trustee under a will, and an Assignee in Bankruptcy, as in *Treves* v. *Townshend*, (*d*) the principle running through every relation of confidence. This executor does not state, as in that case, that he always had at his Banker's a sum suffi-

(*a*) See ante, [illegible] 511. *Cox* v. *Chamberlain, ante*, vol. iv. 631.
(*b*) 2 *Bro. C. C.* 430.
(*c*) 1 *Bro. C. C.* 384.
(*d*) p. 59. 1 *Bro. C. C.* 384.

{(1) Cited 1 Johns Cha. Rep. 510. See also 1 Johns Cha. Rep. 626.}

{(2) See the note to *Piety* v. *Stace, ante*, vol. iv. p. 620.}

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ROCKE v. HART.

cient to answer the fund. In *Forth* v. *Franklyn* the money was always at the Banker's ready, yet the executor was charged with interest, the circumstance, that the money is ready, being no reason for not making it productive. If the rule is laid down, that, whatever may be the consequences, though there are mortgages and bonds, bearing interest at the rate of 5*l. per cent.* which must be discharged out of the personal estate, unless gross conduct is fixed upon the executor, he shall answer only 4 *per cent.* it will operate as a premium for breach of trust. Inquiry now will have no effect: the party, from whom the discovery could be obtained, being dead.

Mr. Alexander, for the Defendant, was stopped by the Court.

The Master of the Rolls.—I have looked into all the cases upon this subject. The result is, that an executor is not charged with interest, except upon one of two grounds: either, that he has made use of the money himself; or, that he has neglected to lay it out for the benefit of the estate. There is always negligence. If the executor makes use of the money, he ought to pay the interest he made. He ought not to derive any advantage himself from the trust property. On the other hand, an executor may be, and is frequently, charged with interest without any profit to himself. If his duty was to lay out, and procure profit to, the estate, and he has neglected to do so, it is reasonable, that he should indemnify the estate against the effect of that negligence. Complete indemnity is not obtained, unless that interest is paid, which might have been made. But that is not the principle upon which the Court proceeds. A rule has been laid down as to interest, from which the Court does not depart without special reasons: not for the general reason, that more might have been made, than might according to the rule have been made; for that exists in every possible case. If it is true, that a direction, that an executor shall pay interest at 4 *per cent.* only, would hold out a premium to executors to keep money in their hands, all the decisions, directing interest at 4 *per cent.* only for keeping the money, are wrong. Yet a great majority of the cases are of that description; and even where the Court holds it altogether unjustifiable; as in *Perkins* v. *Baynton*,(a) and *Browne* v. *Southhouse*,(b) before Lord *Thurlow*: in both which cases the executor was not only held culpable for not laying out the money, but he was supposed to have derived advantage himself. He had mixed the fund with his own money at his Banker's; but the benefit derived by

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Executor making use of the money ought to pay the interest he made; as he ought not to derive any advantage from the trust property.

(a) 1 Bro. C. C. 375. (b) C. C. 107.

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ROCKE v. HART.

[*61]

Executor keeping money at his Banker's, considered as employing it in his trade

him did not appear: yet he was charged only with 4 *per cent.* I should have doubted a little upon those cases; where he lodged the *money at his own Banker's, in his own name. I rather agree with Lord *Loughborough*, that, if a trader lodges money at his Banker's, he has in effect a benefit from that. As he must generally keep a balance at his Banker's, it answers the purpose of his credit, as if it was his own money; and I should hold that to be employment in his trade (*a*).

But, if there is nothing of employment, but mere neglect to pay, it is impossible to charge him with more than 4 *per cent.* In *Treves* v. *Townshend* (*b*) Lord *Loughborough* considers it established, that the property was used in his trade; and the moment that is established it is taken for granted, that the trade produces 5 *per cent* at least, and it is for him to show, he made less. Of course that inquiry was refused by the Defendant, as it is hardly probable that any trade would not produce more. In this case there is nothing to show, the fund was employed by the executor in any trade; or was employed at all. There is only the negative fact, that it was not brought in, as it ought to have been. Upon that naked case there is no ground to charge him with more interest than the general rate of the Court. But it is laid down in *Treves* v. *Townshend*, (*c*) that there must be something special, in order to charge him with more. (*d*) Here is nothing special: nothing but mere negligence.

The interest therefore was confined to 4 *per cent.*

[62] *The Master of the Rolls*, upon an application for costs, *Newton* v. *Bennet* (*a*) being cited, said, the executor must be charged with costs (*b*).

(*a*) *Ex parte Hilliard*, *ante*, vol. i. 89.
(*b*) 1 *Bro.* C. C. 51. (*c*) 1 *Bro.* C. C. 384.
(*d*) See *Piety* v. *Stace*, *ante*, vol. iv. 620. *Pocock* v. *Reddington*, *ante*, vol. v. 794, and the references.
(*a*) p. 62. 1 *Bro.* C. C. 359.
(*b*) *Seers* v. *Hind*, *ante*, vol. i. 294. *Piety* v. *Stace*, *ante*, vol. iv. 620. *Pocock* v. *Reddington*, *ante*, vol. v. 794.

1805.

GRIFFITHS *v.* WOOD.

May 16, 21.

THE answer filed in this cause, purported to be an answer to the bill of *Edward Griffiths*: the Plaintiff's name being *Edmund Griffiths*. A motion was made by the Plaintiff for a sequestration for want of an answer, upon the certificate of the Six Clerk, that the answer appeared by his book to be duly filed; but stating specially the circumstance as to the mistake of the Plaintiff's name. The object of the motion was to bind the Defendant by the representation in that answer: the Defendant on the other hand, wishing to take advantage of the mistake, to correct a fact, which he represented to be by mistake incorrectly stated; for which purpose he had sworn, and tendered, another answer.

Answer, misnaming the Plaintiff, to be considered as no answer: the Defendant therefore not bound by it. On a proper answer being put in, the former ordered to be taken off the file by the description of a paper writing, purporting to be an answer.

Mr. Roupell, in support of the Motion. Mr. Thomson, for the Defendant.

The Lord CHANCELLOR.—This is a singular case. The answer now put in, by mistake or otherwise, refers to a cause by a title, which belongs to no cause. The consequence is, it is no answer; and no accusation can be framed upon it. The Defendant, conceiving there is some mistake in that, which he has put in as an answer, insists, that he has a right, if, as the Plaintiff says, an answer has not been put in, to put in such an answer as he ought. I cannot compel him to swear that which is incapable of being treated as a ground of accusation, not being an answer to any bill, appearing on the file of the Court. The Plaintiff must either say, it is an answer, and keep it; or, that it is not an answer; and then I cannot compel the Defendant to swear it. There are many instances of permitting answers to be taken off the file, and resworn, where there was a mere mistake in the name; but, where the Defendant himself has discovered, that there is contained in it what is false innocently, according to his representation, disputed however by the Plaintiff, the Court cannot put the Defendant in a worse situation than that in which they find him; ordering him to do an act, that will expose him to an indictment for perjury. It is not necessary for the Defendant to apply to have it taken off the file; for it is not an answer. If the Six Clerk certifies to me, that there is an answer, I cannot grant a sequestration. The effect of the certificate is, that there is no answer: but that must be certified to me in the ordinary language. Apply to the Six Clerk again.

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Answer taken off the file and resworn, where there is a mere mistake of the name.

Mr. Romilly, (amicus curiæ,) referred to a case of an answer put in by a wrong title, and a motion to have it ta-

1805. ken off the file, and for an attachment; as, though no answer, it would prevent putting in an answer.

GRIFFITHS *v.* WOOD.

Mar. 21. Mr. *Thomson*, *for the Defendant*, moved, that the first answer should be taken off the file: the Six Clerk, in consequence of what had passed, having filed the second answer.

Mr. *Roupell*, *for the Plaintiff*, objected to the motion, on the ground, that the Court could not say, this was not
64 an answer to a bill by some person of that name; and having once become a record of the Court, it must remain.

The Lord CHANCELLOR said, he would make the order; not calling it an answer, which it could not be considered, but giving it some other description, as a paper-writing, purporting to be an answer.

SKIPWITH *v.* SHIRLEY.

ROLLS. *June* 1.

Decree for raising money under a deed of appointment, though the only copy produced appeared not executed upon recital of it in two settlements, as a subsisting effectual deed, and evidence from the books of a deceased Solicitor of charges for the preparation and execution of it.

BY a settlement, executed in *December*, 1749, upon the marriage of the Honourable *George Shirley* and *Mary Sturt*, one-fourth part of a moiety of estates in *Ireland* was limited to the use of trustees, their executors, &c., for the term of 1000 years, upon trust, in case *George Shirley* should have a son and other children by *Mary Sturt*, and should by deed, executed in his lifetime in the presence of two or more credible witnesses, or by his will, executed in the presence of three credible witnesses, direct and appoint any sum or sums of money, not exceeding in the whole the sum of 6000*l* to be raised out of the said premises, and paid to and amongst such younger children by way of addition to their portions, then and in such case the trustees, or the survivor, &c. should raise and pay such sum or sums according to the appointment, &c.

George Shirley, died upon the 22d of *October*, 1787, leaving his widow surviving and four children; *George Shirley*, *Evelyn Shirley*, *Selina Skipwith*, and *Mary Leigh*. *George Shirley*, the son, died in 1793, *Mary Shirley*, the widow, in *August*, 1800.

65 The bill was filed by *Selina Skipwith*, widow, and *John Leigh* and *Mary*, his wife, suggesting, that an appointment had been made by indenture, dated the 5th of *July*,

1780, duly executed by their father according to the settlement, in the following proportions; viz. 2500*l.* to each of the Plaintiffs, *Selina Skipwith* and *Mary Leigh*, and 1000*l.* to his younger son, the Defendant *Evelyn Shirley*; and praying, that the Plaintiffs may be declared entitled to the two several sums of 2500*l.*; and that they may be raised and paid; insisting, that if the original indenture has been lost or mislaid, or cannot now be produced, yet under the circumstances the Plaintiffs are entitled to have the money raised.

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SKIPWITH v. SHIRLEY

The bill charged, that by indentures of settlement, dated the 8th and 9th of *April*, 1785, to which *George Shirley*, the father, was a party, the said fourth part of a moiety of the said estates was settled, subject to the said term of 1000 years, and the trusts thereof, among other limitations, to the use of *George Shirley*, the son, and *Evelyn Shirley*, and their issue respectively; that the deed of appointment, or some copy or draft thereof, is in the custody of the Defendant *Evelyn Shirley*; that it was prepared by *Thomas Goostrey*, one of the parties to the settlement of the 9th of *April* 1785; and that there are several entries and charges in his books, and some of them in his own hand-writing, for drawing the said indenture of appointment, and attending the execution thereof, and otherwise relating thereto; that the said indenture of appointment was actually recited as a subsisting and effectual deed in the settlement of *April*, 1785; that in the settlement, on the marriage of the Plaintiff, *Selina Skipwith*, dated the 9th of *September*, 1785, to which *George Shirley*, the father, was a party, is contained the following recital: "And "whereas the said *Selina Shirley* is, under and by virtue "of a certain indenture, bearing date the 5th day of *July*, 66
"1780, and made, or expressed to be made between the "said *George Shirley* of the one part, and *Humphrey Sturt* "Esq. of the other part, entitled after the several de- "ceases of the said *George Shirley* and *Mary* his wife to "have and receive the sum of 2500*l.* as and for her part "and share of and in a sum of 6000*l.* which by the set- "tlement, made previous to the marriage of the said "*George Shirley* and *Mary* his wife, is provided for the "portions or fortunes of the younger sons and daughters "of the said *George Shirley* by the said *Mary* his wife, "and charged upon the original part or share of the said "*George Shirley* of and in the said hereditaments and "premises in the said Kingdom of *Ireland*."

The answer of the Defendant *Evelyn Shirley* admitted, that a deed, purporting to be such an appointment, as stated in the bill, was prepared and engrossed on paper, ready for execution, although never executed; and which engrossed deed is in the Defendant's custody; and that

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the said indenture of appointment is mentioned or recited as a subsisting or effectual deed in the settlement of *April*, 1785, and also admitted the recital in the settlement upon the marriage of the Plaintiff *Selina Skipwith*, as stated in the bill, and that *George Shirley*, the father, was a party to that settlement.

The Plaintiffs produced evidence of the following entries and charges in *Mr. Goostrey's* book, the four last articles in his hand-writing, charged to *George Shirley*.

	£.	s.	d.
"Attended you 1st *July*, advising on the "power of charging and appointing 6000*l* "on your share in the *Irish* estate		13	4
"Draft deed of appointment, 3 skins -	2	5	6
[67] "Fair Copy - - -	0	15	0
"Attending you settling it	0	6	8
"Engrossing	1	10	0
"Paid for paper and duty	0	5	6
"Attended execution - -	0	13	4
"It being thought adviseable to have the appointment of the share registered in *Ireland*, engrossing another part thereof, "parchment and duty - -	0	9	6
"Attending *Mr. Sweetman* with the deeds "in order to their being carried to, and registered in, *Ireland* - -	0	6	8
"Paid *Mr. Sweetman's* bill of fees and disbursements for registering the same in "*Ireland*" - - -	2	17	6

The same witness proved a paper-writing in his possession, purporting or appearing to be an engrossment, or a copy, of the said indenture of appointment, but which paper has never been executed by any of the parties therein named, and which came into the deponent's possession upon the decease of *Goostrey*, who was employed upon both the settlements of 1785, and was with the deponent a subscribing witness to that upon the marriage of the Plaintiff *Selina Skipwith*, and a party to the former one.

Mr. Romilly, and *Mr. Thomson*, for the Plaintiffs.

The Master of the Rolls, under these circumstances, decreed the money to be raised, according to the prayer of the bill.

1805.
May 3.
June 15.

BAKER v. MELLISH

After a demurrer to the whole bill overruled, the Defendant may put in a demurrer, less extended, but not without leave of the Court.

AFTER the demurrer in this cause was overruled, (a) the Defendant put in a demurrer and answer; the demurrer going to so much of the bill as sought a discovery of the Defendant's title. A motion was made by the Plaintiff, that the demurrer and answer should be taken off the file.

Mr. Hollist and Mr. Gregg, for the Plaintiff, in support of the motion, insisted that after a demurrer to the whole bill overruled the Defendant cannot put in a demurrer to part, answering the rest: citing *Bancroft v. Wardour*, (b) *Freeland v. Johnson*, (c) and *Hudson v. Huson*, (d) in which the Defendant having obtained an order for time, and a Commission to take a plea or answer, *The Master of the Rolls*, when informed, that a demurrer had been overruled, discharged that part of the order, that gave time to plead.

Mr. Romilly and Mr. Owen, for the Defendant.—The practice, as stated by the Plaintiff, does not appear any where except in a passage of the *Practical Register* (e) referring to *Bancroft v. Wardour*. Lord *Redesdale* stating distinctly, that after a demurrer overruled, a new defence may be made by a demurrer less extended. (f) Certainly there could not be another demurrer to the whole bill, except *ore tenus*; the Court not permitting the Defendant to take time for that purpose. Lord *Redesdale* must have been aware of the case of *Hudson v. Huson*. Upon principle, if it was very questionable, whether equitable relief could be administered, and upon that ground a demurrer was overruled, and the interrogatory was calculated to draw from the Defendant an admission of a charge of felony, ought the Defendant to be precluded from refusing to answer that, on the ground, that the demurrer for want of equity was refused? The rule, that there shall not be two dilatories, means, that the Defendant shall not twice refuse to answer the whole bill. This is a much shorter mode of obtaining the opinion of the Court, than by exceptions. Lord *Redesdale* also states distinctly, though without referring to authority, that after a plea overruled the Defendant may plead again. (a) In *Freeland v. Johnson* the second plea was co-extensive with the first: both to the whole bill. In substance th

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(a) *Baker v. Mellish*, ante, vol. x. 544.
(b) 2 *Bro. C. C.* 67. 2 *Dick.* 672.
(c) 1 *Anstr.* 276. 2 *Anstr.* 407.
(d) MS. cited by *Mr. Hollist* from papers of Lord *Redesdale*, formerly belonging to Sir *T. Sewell*.
(e) *Prac. Reg.* by *Mr. Wyatt*, 160.
(f) *Mitf.* 17.
(a) p. 69. *Mitf.* 17.

1805. release, stated account, &c. was a plea to the whole bill: for the answer was in support of the plea: merely in affirmance of it, and a part of the plea. In general demurrers

Baker v. Mitford.

are treated as dilatories; pleas not: but, though a demurrer for want of parties is properly so considered, a demurrer, going to the point, whether there is to be relief in this Court, has not that character. If a demurrer would clearly lie to one allegation, is the rule so strict, that the Defendant cannot take the opinion of the Court upon the whole merits without waiving that objection: There is no way of having judgment upon that point, except by a second demurrer.

The Lord CHANCELLOR.—Do you go to this extent, that

[70] if the bill asks a hundred questions, the Defendant may demur, first, to the whole, then to ninety-nine, then to ninety-eight, and so on.

For the Demurrer.—The rule is limited to two demurrers; and the Court would not permit the Defendant to go upon each demurrer; the Court to determine, whether it was the same as the former.

The Lord CHANCELLOR.—The question is, whether the rule is not, that you shall not demur a second time without leave, instead of discussing upon each question, whether the demurrer is the same. I understand the practice to be, that, if you demur to the whole bill, you cannot, except *ore tenus*, alter that state of the record; that a demurrer cannot, as a plea may, be good in part, and bad in part; and if it is too general, it must be overruled; but the Court has a discretion, if a fair case is made, to give leave to amend and narrow it, upon proper terms; and that is a very good guard upon the practice. There is a wide difference between that and putting the Defendant to answer. If demurrer after demurrer can be permitted, it must stop somewhere; and the difficulty is to ascertain at what point. A demurrer to the whole bill being overruled, as too general, there is nothing in the judicial opinion of the Court, so delivered, that ascertains why it is too general; and suppose one hundred charges, the Defendant may speculate upon ninety-nine. A second time he may be told, it is still too general; and then he may try ninety-eight, and answer two. Where is this to stop, until he is driven to the single charge, to which the demurrer lies? He may thus upon authority from time to time keep off the issue, or the application of process for want of an answer. If a new rule is to be made, the best seems to be, that, where a demurrer is to be overruled for generality, it depends upon the leave of

Demurrer cannot, as a plea may, be good in part, and bad in part.

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the Court, whether the Defendant shall put in another demurrer, more limited. — 1805.

To the Defendant.—The proposition is, that the same demurrer, upon the same principle, shall not be twice used, which excludes the mischief. In *Selby* v. *Selby* the attempt was to put in the very same demurrer in substance a second time. This motion ought to have been to expunge the demurrer: letting the answer stand.(a) — BAKER v. MELLISH.

Mr. Hollist, in Reply.—In *Freeland* v. *Johnson*(b) the decision was upon the principle that there shall not be two dilatories, as a second plea, though less extensive; which is also established by the other cases. The objection, that the bill may contain something, an answer to which would subject him to penalties, is met by *The Attorney-General* v. *Duplessis*,(c) where it was held, that the Court, overruling a demurrer, never compels the Defendant to answer any thing of that kind.

The Lord CHANCELLOR.—The proposition, stated by Lord *Redesdale*,(d) is directly against this application. Authority goes no farther than this, that after a demurrer overruled, another demurrer, the same both in form and substance, cannot be put in; and the reason is clear; for that is no more than calling upon the Court to re-hear the former judgment, in a manner contrary to the usual form. The question takes a different shape, when it is put thus: whether a person, demurring to the whole bill, and not availing himself of the opportunity he has to demur *ore tenus* to the whole bill for other causes,(a) can put in a less extended demurrer: as it is expressed by Lord *Redesdale*; and, if that question were unprejudiced by decision, the better rule would be that, which I believe is the rule, that the Defendant cannot do that without leave of the Court. There is no doubt it is competent to the Court to give leave. It is frequently said in the books, that, when a demurrer to the whole bill is allowed, the bill is out of Court, and the Plaintiff must begin again.(b) Strictly speaking, that is the principle. But I know many instances, where, after a bill dismissed by order it has been considered in the discretion of the Court to set the cause on foot again. That is an express judgment of the Court; which ought to have its effect; and yet in such a case the Court has interfered. But you are not put to that in this instance; for the question is, whether, during the pendency of the argument upon a demur-

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Demurrer *ore tenus*.

Though strictly by a demurrer to the whole bill the bill is out of Court, yet even after a bill dismissed by order the cause has been set on foot again.

(a) *Taylor* v. *Milner*, ante, vol. x. 444.
(b) 1 *Anstr.* 276. 2 *Anstr.* 407.
(c) 1 *Park.* 144.
(d) *Mitf.* 17.
(a) p. 73. *Pole* v. *Price*, ante, vol. vi. 779.
(b) See *Smith* v. *Barnes*, 1 *Dick.* 67. *Lloyd* v. *Loaring*, ante, vol. vi. 773.

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BAKER v. MELLISH.

rer, and before judgment, the Court can say, the demurrer is too general, and, if more confined, it would be good, and will, for the sake of justice, permit the Defendant to amend the demurrer, before any judgment is given upon it, as it stands. Why not? The Court frequently permits the Plaintiff to amend the bill in such a stage of the argument, to avoid the effect of a demurrer. Why should not the Defendant have leave to amend, when the demurrer applies to part of the bill only? That rule is much more wholesome than the contrary; for it may be suggested, that, if a demurrer to the whole bill, consisting of twenty questions, is overruled, it may be tried as to nineteen; which, though not a very honourable way of acting, the Court has no right to prevent, if [*73] the law admits it; like the case of a denial of combination, with an admission, that A. died on a particular day (a). Consider it in other way; not supposing demurrer after demurrer, in that manner; but, that the Counsel think the demurrer good to five out of the twenty questions; the Judge, upon the argument, being of opinion, that it is good to five only; still there must be several demurrers. It is said, the Court must always judge, whether the demurrer is the same; but the Court may be called upon repeatedly; and the inconvenience of submitting that question over and over is inevitable. There is great difference between having an answer, even insufficient, and a demurrer to part of the bill, together with an answer; in which case the sufficiency of the answer cannot be questioned, until the demurrer is disposed of; and, if that is to be upon several arguments, until it is brought down to the single point, upon which the demurrer lies, the rule would be most mischievous. The inconvenience on the other hand, at the utmost is, that at any time pending the argument on the demurrer, and before the judgment is got into a complete state, even upon the opinion of the Court delivered, the question may be submitted to the discretion of the Court, whether they will allow the Defendant to amend the demurrer, and that discretion puts the Defendant in the situation in which it is just to place him, but which the justice due to the Plaintiff requires that he should be placed in as soon as possible. As to particular questions upon this record the Defendant should not be called upon to answer; for he is put precisely in the same situation as if he had answered, and, notwithstanding a demurrer to the whole bill overruled, the Defendant may object to answer a question, if it is not lawful to ask it; and may by answer pro-

Admission of a single fact, besides the denial of combination, a compliance with the terms not to demur alone.

(a) See *Tomkin* v. *Lethbridge*, *Thomas* v. *Lethbridge*, *ante*, vol. ix. 178. 163.

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tect himself from answering such a question: (a) but whether he should be in that situation, is a very different consideration: for if he says he is not bound to answer, the Plaintiff may immediately contest with him, whether he has sufficiently answered; but he is not in that state, at liberty to demur again, until that demurrer is disposed of; and then the question as to the sufficiency of the answer upon the other points is to commence.

Finding this question not settled by decision, and [illegible] both ways, the best opinion I can form is, that the Defendant, having demurred to the whole bill, shall not demur to a part without leave.

A motion was made by the Defendant for liberty to demur to so much of the bill as sought a discovery of his title. Leave [illegible]

Mr. Romilly and Mr. Green, in support of the Motion.—This is a distinct ground of demurrer, that a Defendant is not to be compelled to discover his own title; and is not liable to the objection of the practice, as stated by Lord *Redesdale*, that it tends to inconvenience and delay, which clearly is not the object. Is not a Defendant, because he has on a different ground demurred to the whole bill, to be protected from answering to a charge of felony?

Mr. Holme, and Mr. Cooke, for the Plaintiff, objected, that no instance of this application was produced; and insisted, that upon the opinion of Lord *Hardwicke*, in *Dormer* v. *Fortescue*, (a) and *Newman* v. *Godfrey*, (b) the Defendant might by answer protect himself from answering any thing improper. [75]

Mr. Romilly, in Reply, observed, that the principle, which would, after a demurrer overruled, prevent the Defendant demurring to part of the bill, will also prevent his insisting by answer, that he should not answer part, according to Lord *Thurlow's* opinion in *Shaw* v. *Ching*; the objection, that there are two dilatories, occurring equally, whether by answer or demurrer.

The Lord CHANCELLOR.—The question is, what I should have done, if asked, immediately after the demurrer was overruled, to permit a demurrer as to part only. The point, whether the Defendant, having demurred without effect to the whole bill, can refuse to answer part, is very

(a) This question has been revived in several cases, that have since occurred, and is still undecided; the circumstances of those cases not affording an opportunity of determining the point. See *Dolder* v. *Lord Huntingfield*, post [283,] where the opposite authorities will be brought together.

(a) p. 75. 3 Atk. 282. See page 281. (b) Mitf. 17. (b) 2 Bro. C. C. 332.

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different from the point, whether a Defendant, once submitting to answer, shall answer throughout; as in *Cookson* v *Ellison*.(c) where, *Buck* being a mere witness, and submitting to consider himself as a Defendant, the question was, whether he should answer the whole. Upon those cases(d) Lord *Kenyon's* opinion was, that the Defendant having answered more than was necessary, there was no occasion that he should answer further. The opinion of Lord *Thurlow* was different In such a case, the
76] Plaintiff stating himself to be heir, and praying a discovery, it has sometimes been thought, that the Defendant, by answer denying that he was heir, need not make any discovery: and sometimes it has been considered otherwise, as the Defendant may die, and the discovery be lost

But that is not this case, in which the point stands thus: whether the Plaintiff, coming for relief against the attornment of the tenant, has a right to ask the person against whom he brings the ejectment, what is the title, upon which the defence is to be made, for that is the substance of the question The proposition appears new to me, that a Plaintiff has a right to come here, and ask the other party, how he means to defend himself at Law. The Plaintiff must come upon his own case. The ground is quite distinct, and of very great importance, whether the Plaintiff, merely as bringing an ejectment, may call upon the Defendant, against whom he brings it, standing under no obligation of privity or conscience, to lay before a Court of Equity the state of his title The question upon the whole is, whether it is as convenient to justice to permit this demurrer to be argued, as to overrule it, and make the Defendant answer. The general demurrer stated a question very fit for the consideration of the Court upon demurrer, and integrity was exercised in the whole. If I had been asked for leave to amend the demurrer immediately, I ought to have given leave. It is therefore reasonable in this case, that this demurrer should be argued: the parties understanding, that, if overruled, the Court is to give such directions as in that stage of the cause, and under these circumstances, may be proper with reference to the time.

The demurrer was allowed by consent, without argument.

(c) 2 *Bro* *C* *C* 252.
(d) See *Jerrard* v *Saunders, ante,* vol ii 254 *Dolder* v. *Lord Huntingfield, post,* {283,} and the references, from which this point appears still undecided.

1805
June 17.

HEARNE v. OGILVIE.

Upon a motion to discharge an order to take the bill *pro confesso* on payment of costs and an offer to put in an answer, the Court required to see, what answer they proposed to put in.

Whether the application should be for leave to answer, Quære.

AN order had been obtained in the usual way to take the bill *pro confesso*. A motion was made on the part of the Defendant to discharge that order on payment of costs.

Mr. Hart, in support of the Motion, referred to *Williams* v. *Thompson*, (a) observing, that what Lord *Thurlow* stated was, that, where the Defendant puts in an answer after the order, and the Plaintiff *accepts the answer*, it is a waiver of the process: not, as represented in the report, where "the Plaintiff takes exceptions to it" (b). He said, the Defendant was willing to put in an answer, excusing the contempt, on the ground, that the Defendant was unable to leave *Holyrood House*.

Mr. Romilly, for the Plaintiff, opposed the motion.

The Lord CHANCELLOR.—This is the first application of the kind. After an order to take the bill *pro confesso* has been obtained, the Defendant having resisted process two years, an application is made, not only upon the mere payment of costs to discharge that order, but to put the Plaintiff to the peril of having just such an answer as the Defendant shall think proper to give. After an order to take the bill *pro confesso* has been obtained, the Court will at least see the answer you propose to put in.

It was then suggested, that the application ought to be for leave to answer. [78]

The Lord CHANCELLOR said, that must be without prejudice to the order to take the bill *pro confesso*; and directed, that the Defendant should communicate what answer he proposed to put in.

No answer was put in. The cause was set down at the Rolls, and a decree was made, the bill being taken *pro confesso*. 1806. February 14.

(a) 2 Bro. C. C. 279.
(b) This was stated from the information of Mr. Holt, who was counsel in that case.

1805.
June 17.

BARKER v. GOODAIR.(1)

Injunction against proceeding, under a foreign attachment, by a joint creditor, upon a separate Commission of Bankruptcy, over-reaching the attachment by relation to the Act of Bankruptcy.(2)

COHEN and *Pergal* were employed by *Isaac* and *David Valkery* to purchase goods at a sale of the *East India* Company, and received the usual warrant of delivery upon payment of the price; and, the goods being intended for exportation, the Company, agreeably to their rules, retained them in their warehouses, to remain there until delivered for immediate exportation.

On the 3d of *January*, 1805, a Commission of Bankruptcy issued against *Isaac Valkery*, *David Valkery* being out of the jurisdiction. On the 31st of *December*, 1804, a foreign attachment, under an action in the Court of the Lord Mayor of *London*, by *John Goodair* against *Isaac* and *David Valkery*, for a debt of 115*l.* was served on *Cohen* and *Pergal*, who pleaded the general issue "*nil habent*." Upon the trial, before the Recorder of *London*, the Plaintiff in that action obtained a verdict.

The bill was filed by the Assignees under the Commission of Bankruptcy, and *Cohen* and *Pergal*, against *Goodair* and the *East India* Company; praying, that *Goodair* may be restrained from proceeding upon the attachment against the goods, and that the *East India* Company may be restrained from delivering them up. The bill stated, that the Act of Bankruptcy, upon which the Commission issued, was committed on the 26th of *December*, 1804.

[79]

The answer of *Goodair* insisted, that *Cohen* and *Pergal*, being in possession of the warrants, had the power and disposition over the goods; that the judgment of the Mayor's Court cannot be controverted in this Court; and that the goods having been purchased on the joint account of *Isaac* and *David Valkery*, the Defendant had a right to attach them notwithstanding any Act of Bankruptcy, which the Defendant did not admit to have been committed prior to the attachment; the answer as to that stating, that the Defendant does not know, &c. and therefore cannot set forth as to his belief or otherwise, whether *Isaac Valkery* had committed an Act of Bankruptcy.

Mr. Romilly, and Mr. Thomson, in support of the Motion for an Injunction.—It is very doubtful, whether the warrants in the hands of the *East India* Company could be attached; and, whether such an attachment would give a right to seize the goods. This practice of attaching goods liable to a Commission of Bankruptcy, is become very prevalent. Almost all the property of these partners is

(1) Cited, 2 Conn. Rep. 517.

(2) See Church et al. v. Knox, 2 Conn. Rep. 514, and the note to Taylor v. Fields, ante, vol. iv. 396.

joint, and there are no other means of obtaining a distribution, except by a Commission of Bankruptcy against him, who is in this country. The Act of Bankruptcy, upon which the Commission stands, was committed on the 26th of *December*, upon which the Assignees are entitled to the interference of the Court. The two Statutes of King *James*,(a) vesting the property in the Assignees, though not expressly [illegible] to partnership must be considered as applying to Bankrupts of every description. The former of those Statutes enacts expressly, that no person shall obtain the effect by attachment in the Mayor's Court; the other, that no judgment in the Mayor's Court shall have that effect, unless execution has followed, as a Common Law judgment without execution does not supersede the right of the Assignees. A Commission of bankruptcy has been called a Statute execution: the property being vested in a third person, the foundation of the jurisdiction of the M[illegible] Court fails. There is no mode in which [illegible] can be [illegible] the effect of it [illegible] the application, the appeal being confined to [illegible] the record; and would be anomalous, that the Mayor's local jurisdiction, for the convenience of the citizens, should operate upon the rights of other persons and to such an extent. This application stands, not only upon the general principles on which this Court interferes against abuse of the judgment of another Court, but also upon the particular jurisdiction in Bankruptcy. The effect of refusing to interpose will be, a race by creditors to find the property and get it in the Mayor's Court. That jurisdiction could not be intended to go to this extent. The course of the proceeding is an action of debt in the first instance against the debtor. The return to the process is, that he is not to be found; or, that there is no property directly in his possession. Upon that the attachment issues, surmising, that there is property of him in the hands of *A.*, who is served; and the only issue he can tender is, that he has not such property in his possession. If the garnishee cannot tender that issue, though he may have no concern with the original debt, the result is a judgment against him upon a verdict, by which the property in his hands is bound. But he may give bail for the debt, not merely for appearance, and even though the property in his hands may prove not to be equal to the debt. The effect of allowing this will be a subversion of the whole Bankrupt Law.

1805. BARLAR v. GOODAIR [80] [81]

The Attorney General, Mr. Cooke, and Mr. Bolland, for the Defendant Goodair.—The question is, whether the

(a) Stat. 1 Jac. I. c. 15. s. 13. Stat. 21 Jac. I. c. 1[illegible]

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Defendant, who has by the effect of an attachment obtained possession of partnership property, for the purpose of satisfying his joint debt, can be compelled to relinquish the benefit of that, and to deliver up the property to the Assignees under a Commission of Bankruptcy against the partner. There is no principle for that. It is very difficult for this Court to relieve upon the ground of an erroneous judgment in the Mayor's Court. Error in that Court must be cured in the regular course. There is a Court of Appeal appointed by Commission under the Great Seal, and an appeal from that Court lies to the House of Lords (a). A bill of exceptions may be tendered, to bring error upon the record. Your Lordship can no more interfere with the Mayor's Court than you can review a proceeding in any Court in *Westminster Hall*. The objection, that the attachment has issued against the party having the warrant only, not the goods, may be taken upon the plea in the Mayor's Court "*nil habet.*" This is not the first application of this kind. In *Brewster* v. *Potts* (b), the same objection was urged by Assignees [82] of a Bankrupt, and the injunction was refused, upon the ground, that, though one partner was a Bankrupt, the attachment was not affected by his Bankruptcy; the whole joint property being liable to the joint debts, the attachment must therefore remain. The attachment lays hold of the property in the same manner as an execution at Law, and in that case the right depends upon an account; which must be taken in a suit, in which the other partner is a party, and cannot possibly be taken in his absence (a). That objection, that the only right of the Assignees is subject to the account, ought to have been made in the Court below. The answer does not admit, that an Act of Bankruptcy was committed previously to the attachment.

Mr. Romilly, in *Reply*.—Upon the only difficulty, as to the jurisdiction to interpose against a judgment upon a legal question, the case of *Brewster* v. *Potts* is a direct authority: which went upon the ground, admitting the jurisdiction, that the Plaintiffs were not entitled to the

(a) See *Emerson* on the City Courts.

(b) 28 *Jan.* 1801, in Chancery, before Lord *Loughborough*. *James* and [illegible] *Fletcher* were merchants in *London*, in partnership. In the latter part of the year 1799, *James Fletcher* deposited goods with *Potts* and Co., upon which they advanced money, but not to the value. *James Fletcher* had committed an Act of Bankruptcy in *November*, 1799. In *March*, 1800, he stopped payment, and the Commission issued. Upon the 17th of *March*, 1800, the attachment was obtained by a joint creditor, who upon a plea of the general issue obtained a verdict. The Bill was filed by the Assignees, and a motion for an injunction was refused by The Lord Chancellor.

(a) p. 82. See *Taylor* v. *Fields*, ante, vol. iv. 396.

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injunction. The Assignees could not make themselves parties to the cause in the Mayor's Court: if they could, they could do nothing but dispute the validity of the debt. The answer has no such denial of the Bankruptcy as will prevent its * being considered established for this purpose. If the want of admission by the answer could be carried to such an extent, an injunction could never be obtained. At least the Defendant ought to pledge his conscience thus far, that he does not believe an Act of Bankruptcy was committed. The attachment cannot have the effect of destroying all liens; and the Assignees, as against the solvent partner, have, notwithstanding the tenancy in common, a lien upon the whole property, until all the accounts are wound up. But the injunction is [illegible] principle, [illegible] among the [illegible].

The LORD CHANCELLOR [illegible] that I should be proceeding to [illegible] the Mayor's Court assert, that the [illegible] had in their hands joint property of [illegible]. The answer to that [illegible] Act of Bank-ruptcy [illegible] upon which a Commission [illegible] and the Recorder was, that the Bankruptcy [illegible] stand in the way of a direction to the jury to find, that the plea was not true. Clearly those circumstances would not justify the statement, that the plea was true; for, if the Act of Bankruptcy was committed, before that assertion was made upon the record, as the Commission has relation to the Act of Bankruptcy, the property from the date of the Act of Bankruptcy is the property of the solvent partner and the Assignees. The Law is clear, that the Commission has relation to the Act of Bankruptcy, and all the property vests by relation from that time. That principle is directly asserted * in a case of attachment in the *West Indies*, which for a long time was thought not to be affected by a Commission of Bankruptcy here. I first raised the point; which depends upon that principle, not upon the words of the Acts of Parliament. But what the proceeding by attachment would justify, whether, if the property, asserted to be the joint property of the two, turns out not to be so, but to have become the property of one and the Assignees of another, the proceeding in attachment would permit the creditor to say, though his assertion was falsified, yet he was entitled to his debt out of the interest, remaining in the partner, his debtor, I cannot now determine. Upon the principles of strict law it is not true,

Effect of the relation under a separate Commission of Bankruptcy, making the Assignees and the solvent partner tenants in common from the date of the Act of Bankruptcy. Attachment in the *West Indies* over reached by Bankruptcy.

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BABBIT v. GROUAIN

that property is the joint property of these two persons, which [illegible] the property of one of them, and of the Assignees of the other. This question is not merely between the garnishee and the attaching creditor. If it was, and the garnishee had no interest, clothing the other with the character of a joint creditor, I do not see how I could deal with it, for a proceeding of this Court is binding upon me as much as a proceeding of the Court of King's Bench, but not more binding. Suppose then, both parties were Bankrupts, and, the garnishee pleading, that this was not the property of the two persons, the verdict was, that it was their property, and upon that the creditor got the property, or the value of it, if a Commission then existed, or was afterwards taken out, the effect of the attachment would be defeated, upon the same doctrine, that from the date of [illegible] prior Act of Bankruptcy the property ceased to belong [illegible] Bankrupts, and by relation to that [illegible] Act of Bankruptcy belonged to the Assignees. So an execution [illegible] Act of Bankruptcy [illegible] covering the property.

An execution over-reached by a prior Act of Bankruptcy.

[* 85]

* The distinction of this case [illegible] are not Bankrupts. The question [illegible] that are, what was the interest of the Assignees? and what interest could they have asserted, if no such proceeding by attachment had taken place? then, what difference as against them that proceeding makes? When one partner becomes a Bankrupt, his interest in the partnership property is vested in his Assignees, and, according to the doctrine of this Court, perhaps with equities in them, vastly beyond what tenants in common have, where no Bankruptcy has occurred. In the case of a judgment by a separate creditor, both the partners being solvent, it has been held, that the creditor may take by execution a moiety of a chattel, though he is only a separate creditor. A great variety of difficulties occur, as to that, whether it stands in Equity as at Law. It is clear, a partner holds a chattel with his partner subject to all the equities that partner has upon it. A question has often occurred, whether a separate creditor, taking a moiety of the chattel in execution, is in the same circumstances, viz. that he may call for a sale of that chattel, and divide the money; or, whether this Court would force upon him the whole account of the partnership, permitting him to take only that interest which the partner, his debtor, would have been entitled to, after the account. (a) But we have gone much greater

Execution under a judgment by a separate creditor as to a moiety; whether in equity subject to the partnership account.

Query? In the case of a separate Bankruptcy execution not permitted, even by a joint creditor but the joint effects distributed even in the absence of the solvent partner, and the surplus applied under all the equities subsisting between the partners themselves. This pursued, in some degree, though very tenderly, in the administration of assets.

(a) See *Taylor* v. *Fields*, *ante*, vol. iv. 396, [and note.]

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lengths in Bankruptcy as to that, and even in the absence of the other partner. In Bankruptcy, after one partner had become a Bankrupt, I do not recollect, that a joint creditor was ever permitted to bring an action, and by execution fasten upon a moiety of the effects. On the contrary, in the absence of the solvent partner, if, for instance, he was at *Lisbon*, we say, the Assignees shall take the joint property, and deal with it as the partner himself ought to have dealt with it; paying all the joint creditors equally, as far as the joint property goes, and applying the surplus, if any, under all the equities subsisting between the partners themselves (a). This is done here every day, though how it is managed in the law I do not know. We have in some degree put ourselves in the administration of assets, though very inadequately. [86]

It is clear then, the proceeding in the Mayor's Court can never bind the Assignees, who were not parties, nor this Court, inquiring, what is the interest of the Assignees in these chattels. By law they are tenants in common of this part of the property from the date of the Act of Bankruptcy, and, supposing it, if the attachment is good against the garnishee in respect of that interest which the individual had in it, and only in respect of that interest, which was the interest of each of these individuals. Both had not the interest after the Bankruptcy; for the Bankrupt's interest was in his Assignees by relation; and, if notwithstanding the plea is not strictly true in law, and the interest of a solvent partner would belong to the attaching creditor, it could carry only one moiety. If that is so, how does the attachment give the whole to the attaching creditor, with a right to convert the whole into money, and apply one part to himself, the other to the assignees? That is a question, which, if he were a separate creditor of that partner, would fall within the cases, to which I have alluded. He is said to be a joint creditor of the partners, and it may be argued, as in *Bristow* v. *Potts*, that the Assignees could not take the property from the joint creditors; as, the joint effects being applied first to the joint creditors, the Assignees, being entitled only to the interest of one partner, after the partnership demands are satisfied, could not claim any thing, as separate estate, until all the joint debts are paid. [87]

This is a question not only between this creditor and the Assignees, but between this joint creditor and all the other joint creditors; who would be entitled to demand the application of the joint estate rateably among them. The Assignees, notwithstanding the judgment in the

(a) *Hankey* v. *Garratt*, 3 *Bro. C. C.* 457; *ante*, vol. i. 236.

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Court below, being tenants in common of these chattels, and having a right to an application, as between themselves and others, as partnership property is to be applied, subject to some arrangement, to give an opportunity of having all these questions decided, I must put some check upon this proceeding, to the extent of enabling this Court to decide, how among all these persons these chattels are to be applied. As the property, I understand, must be exported, the proper course at present is to order, that it shall be exported and sold; and the money produced by the sale brought into Court, subject to the questions in this cause.

Rolls. June 17, 18

BERRY v. USHER.

Devise of real estate, to be sold. The object being a provision for legacies, not an absolute conversion to all intents, a resulting trust for the heir at law as to the surplus, which was not affected by the appointment of "Residuary executor."(1)

Executor a trustee in respect of a debt due by him to the testator.

[*88]

JAMES PLOMER, by his will, as to all his freehold messuages, lands, &c. and all other his worldly estate, both real and personal, gave, devised, and bequeathed *the same to *John Usher*, upon trust, and upon the several uses, &c. after-mentioned, viz. the rents and profits of the whole of his freehold messuages, lands, and tenements, and the interest of all his personal estate, to be paid to *Susannah Berry* for the term of her natural life, after payment of his debts, legacies, &c. and from and after her decease he willed and devised, that *John Usher*, his executors or administrators, should, as soon as conveniently might be, either by public auction or private contract, sell and dispose of all and singular his freehold messuages, lands, tenements, and hereditaments, and personal estate and effects, and from the moneys arising therefrom, in the first place, the testator gave and bequeathed to his great niece *Ann Berry* 1000*l.* to be paid to her by his said executor for her separate use: but, in case she should die before *Susannah Berry*, he directed, that his said executor should pay and divide said 1000*l.* equally between all the children of *Ann Berry*, (excepting *Elizabeth*, her then only child,) that should be living at the death of *Susannah*, when they should attain their respective ages of twenty-one years. He gave to *Elizabeth Berry* 1000*l.* when she should attain twenty-one; and in the mean time directed that his said executor should pay the interest for her maintenance. He gave and bequeathed to his nephew *Joseph Jefferis* the interest of 500*l.* and to his great niece *Susannah Jefferis* the interest

{(1) See *Craig* v. *Leslie*, 3 Wheaton 563.}

of 500*l.* for the term of her natural life, to commence immediately after the decease of *Susannah Berry;* and he gave and bequeathed to the said *John Usher* 200*l.*; upon trust to pay the same to the treasurer for the time being of the *Bristol Infirmary* within twelve months after the testator's decease, which sum he thereby charged upon his personal estate, and desired, it might be applied to the charitable uses of the said infirmary, and the testator did thereby nominate, constitute, and appoint, *Susannah Berry* and *John Usher* to be joint residuary executrix [89] and executor of his said will

By a codicil, reciting the bequest of 200*l* to the treasurer of the *Bristol Infirmary*, the testator revoked and made void the gift or direction for payment of the said sum by his said will, and did thereby give and bequeath all the remainder of his personal estate, not disposed of by his said will, to the treasurer for the time being of the *Bristol Infirmary*, to be applied to the charitable uses of the said infirmary, when and as soon as his legacies should be paid, and his trust estate carried into effect, as mentioned in his said will, and he confirmed his said will in all respects, except as thereby altered

The testator died without issue in 1803, leaving *Susannah Berry*, his sister, and *Joseph Jeffries*, the eldest son of a deceased sister, his co-heirs at law. *Susannah Berry* and *Usher* proved the will

The bill was filed by *Susannah Berry* and the other legatees under the will against *Usher*, suggesting, that the personal estate will be insufficient for payment of the debts and legacies; and therefore there will be no residue for the Charitable Institution, and that the residue of the money to arise from the sale of the real estate, after payment of so much of the legacies as the personal estate will not be sufficient to satisfy, is a resulting trust for the heirs at law; insisting, that by the bequest of the residue to the Charity by the codicil the testator revoked any bequest of the residue by the will, and that the same is a resulting trust for the heirs at law; and praying accounts of the personal estate and of the rents and profits of the real estate, &c.

The Defendant by his answer admitted, that he was [90] indebted to the testator in the sum of 200*l.* lent to Defendant on the joint bond of the Defendant and his brother, and 100*l.* secured by the Defendant's bond; and submitted, that by the appointment of him as executor the debt is released or extinguished, except against creditors; and he claimed an interest in the residue under the will.

The Master of the Rolls, upon the question, whether the appointment of executor has the effect of releasing or

1805. extinguishing the debt from the executor to the testator's estate, said, it was perfectly settled by the decisions; and the point was given up by the Defendant without argument. (a) (1)

BERRY v. USHER.

Mr. Piggott, and Mr. Cooke, for the Plaintiffs, the Heirs at Law, insisted, that a resulting trust for the heirs at law as to the residue of the produce of the real estate was clear, upon *Ackroyd* v. *Smithson*, (b) and *Robinson* v. *Taylor*, (c) in which the whole real estate was directed to be sold, distinguishing this case from *Mallabar* v. *Mallabar*: (d) in which there was a gift, taking the property from the heir: in this instance there being no gift,
[91] but a mere implication as to the produce of the real estate from the nomination of executor, by which the personal estate would pass, though even that is negatived by the codicil.

June 18. *The Master of the Rolls*.—I do not see how this case can be distinguished from *Robinson* v. *Taylor*. (a) The testator, after some specific bequests, gave to *Susannah Berry* the income of the whole of his property during her life. Then he means to give some pecuniary legacies to some of his relations, and, to make a fund for those legacies, directs all his property, real and personal, to be sold, and then proceeds from the moneys arising therefrom to give the legacies. He has done no more to convert this real estate into personal than was done in *Robinson* v. *Taylor*. (b) No stronger indication of an intention to do what is called making it personal estate out and out, that is, to all intents and purposes, appears in this will, than in that. I apprehend therefore, that, if the will had stopped here, the heir, paying the legacies, might have kept the estate to himself unsold. The question then is, whether there is any subsequent disposition of the residue of the real estate, which will pass it as real estate. If the character of personal estate was impressed upon it to all intents and purposes, the mere appointment

(a) The effect at Law is, that the action is gone. *Wankford* v. *Wankford*, 1 *Salk.* 299. But a trust is raised in Equity, not only for a residuary legatee, *Brown* v. *Selwin*, *For.* 240, but even for the next of kin, *Carey* v. *Goodinge*, 3 *Bro. C. C.* 110. Under the circumstances of *Fox* v. *Fox*, 1 *Atk.* 463, the executor could not be permitted in Equity to avail himself of that character, at the same time insisting upon his mortgage, the only consideration for which was the debt.

(b) 1 *Bro. C. C.* 503. (c) 2 *Bro. C. C.* 589, *ante*, vol. i. 44.

(d) *For.* 73, cited from a MS. note, *ante*, vol. x. 503.

(a) p. 91. 2 *Bro. C. C.* 589. *Ante*, vol. i. 44.

(b) 2 *Bro. C. C.* 589, *ante*, vol. i. 44. See *Williams* v. *Coade*, *ante*, vol. x. 500, and the references.

(1) *Winship* v. *Bass et al.* 12 Mass. Rep. 199. See *Stevens* v. *Gaylord*, 11 Mass. Rep.

of an executor would be sufficient to carry that property to him, either for his own benefit, or as trustee for the next of kin. But, if upon the preceding part of the will the surplus after payment of the legacies is not made personal estate, but is to be considered as real estate, my opinion is, that the appointment of these two persons to be residuary executors will not carry the residue of real estate, for the appointment of executors will not have that effect, and the epithet "residuary" would avail them only in a question with the next of kin. It is some evidence, that they are to take the residue beneficially. But the question is, what residue? Such as goes to the executor: not a residue of real estate, for, if real estate is given for life, and nothing is said about the remainder, but afterwards the testator appoints a *residuary* executor, it could not be contended, that the remainder of the real estate would pass to that executor by the effect of that phrase. Plain words of gift or necessary implication are required to disinherit an heir at law, which do not appear to me to exist in this instance.

1805. Berry v. Usher. [92]

Plain words of gift or necessary implication are required to disinherit an heir at law.

RAPHAEL v. BOEHM (1)

1805 *Mar.* 19. 1804 *Jan.* 28. *Aug.* 14. 1803 *Dec.* 10. 12

EDWARD RAPHAEL, of *Madras*, by his will gave to each of his executors 1000 pagodas; declaring, that such legacy should be in full for the trouble they might have in performing the duties in his will, and that they should not have any claim for commission, or derive any advantage from keeping in their possession any sums of money, without duly accounting for the *legal interest thereof, according to the legal interest of the country, where they act. The testator then disposed of the residue of his estate upon certain trusts for his children, and directed, that the interest of the portions, or such part as his executors should deem sufficient, should be applied to the maintenance and education of each child respectively: and the surplus of such interest, if any, should be accumulated for the benefit of such child respectively; and

Executor, directed not to derive any advantage from keeping money in his hands without accounting for legal interest, and to accumulate for the *cestuy que trust*. Decree, directing a computation of interest at 5 *per cent.* on all sums received by him, while in his hands, "and that the Master do in such computation make "half yearly rests." The object of that direction is to charge compound interest; and the decree, though perhaps going further than usual, was held under the circumstances properly executed by a computation of interest upon each receipt from the day it was received, the balance of receipts, with the interest so calculated, and payments being struck at the end of the half year, and that balance, so composed of principal and interest, being carried forward as an item in the account, producing interest. (2)

(1) Cited 1 Johns. Cha. Rep. 627. 16 Mass. Rep. 228.

(2) *Schieffelin v. Stewart*, 1 Johns. Cha. R[illegible]

1805. RAPHAEL v. BOEHM.

make part of his or her estate, and he directed part of his estate to be remitted to *England*, to be laid out in the funds there for the benefit of his children.

The testator died in *June*, 1791, leaving executors in *India*, and *Edward Boehm*, his executor in *England*. The bill was filed in *Michaelmas* Term, 1794, by the children of the testator, against *Boehm* for an account. On the 17th of *December*, 1794, *Boehm* obtained an order for leave to pay into Court 40,000*l*. part of the money in his hands arising from the testator's estate, which was paid in accordingly, and laid out. By his answer he stated, that he and his partners had in their hands a large sum of money belonging to the testator, and that about the 1st of *July*, 1791, there was transferred from the partnership of *Boehm* and Co to the account of the Defendant, as executor of the will, the sum of 30,000*l* part of the testator's property, and the Defendant afterwards at different times had other sums transferred to his account in like manner, which he set forth in a schedule, one of which sums was 12,000*l* received by him on the 12th of *March*, 1792, also from the partnership of *Boehm* and Co. in which he was engaged, and he had received some other sums on account of the testator's estate. He stated, that he had paid the debts, &c and the maintenance and education of the Plaintiffs, and other sums on account of [94] the estate, but he had not placed any part of the testator's estate in the public funds. He then stated the payment he had made under the order of the Court in *December*, 1794; that the balance in his hands was ready to be paid, as the Court should direct, and that he was ready to answer interest for the testator's money, which he had from time to time in his hands, as the Court should direct.

The usual decree for an account was made, and an inquiry was directed, in whose name any and what part of the testator's personal estate in *England* was at his death; and, when the same, or any and what part, came to the hands of the Defendant, and, what sums of money had since the testator's death come to the hands of the Defendant.

In answer to that inquiry the Master's report stated, that at the death of the testator there was in the hands of *Boehm* and Co. as his agents in *England*, a balance of 30,807*l* 3*s* 10*d*., and that the executors in *India* continued to make considerable remittances to the partnership; the amount of which, as well as the interest received thereon, after deducting commission, was paid over to the Defendant, as executor in *England*, and he had accounted for the same, as well as the said balance.

By an order, pronounced on further directions, on the 26th *July*, 1798, it was ordered, that the Master should

compute interest after the rate of 5*l per cent. per annum* on all sums of money, part of the testator's estate, received by or come to the hands of the Defendant, from the time he received the same respectively during the time the same continued in his hands, except the legacies to the executors, and what was expended for maintenance, "and "that the Master do in such computation make half-"yearly rests." 1805. RAPHAEL v. BOEHM.

[95] Under that order the Plaintiffs carried in a charge of interest on all sums of money, which came to the hands of the Defendant from the time he received them respectively during the time they continued in his hands, making half-yearly rests, which charge was allowed; and the Master by his report stated, that he had computed such interest; and in a schedule had set forth an account of all such sums of money, so received by the Defendant, specifying the times such money remained in his hands, and a calculation of interest thereon: and that he had also in such computation made half-yearly rests, and, that the interest on such several sums, from time to time remaining in the hands of the Defendant, calculated down to the date of the report, amounted to 10,996*l.* 17*s.* 11*d.*

To this report exceptions were taken by the Defendant, on the following grounds: 1st, that the Master had not calculated interest, and made half-yearly rests, as directed by the order, but had from time to time made frequent rests in the course of each half year; and had made half-yearly rests for the purpose merely of charging the Defendant with compound interest; and had carried on the account for a considerable time after the Defendant had paid all the principal moneys, received by him, for the mere purpose of charging him with interest upon interest; and by those means had made the interest amount to a much larger sum than he ought to have done; and much more than it would have amounted to, if he had calculated such interest according to the directions of the order, and the course and practice of the Court in similar cases.

2dly, That the Master had made a rest at every receipt and payment by the Defendant, and by so doing had made frequent rests in the course of each half year; instead of which he ought, at the end of each half year, to have taken the amount of all the Defendants receipts and payment respectively in the course of such half year, and to have struck the balance thereof: and that balance, accordingly as it was in favour of, or against the Defendant, should have been deducted from, or added to, the balance of the former half year. [96]

3dly, That the Master had at the end of each half year carried forward what he had calculated to be due from

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the Defendant for interest; and added the same to what was stated to be due for principal; and had from that time calculated interest upon the whole sum, including both principal and interest: whereas he ought not to have added interest to principal, or to have calculated any interest upon interest; but ought at each half-yearly rest to have calculated interest on the balance of principal, due from the Defendant; and to have stated the same as a separate charge, and not to have added the same to the balance of principal.

By an order, made upon hearing the exceptions on the 14th of *August*, 1804, *Mr. Cox*, who had succeeded *Mr. Holford*, was directed to review *Mr Holford's* report as to the calculation of interest, and to state the practice of all the Master's offices. *Mr. Cox* by his report stated, that he conceived the meaning of a direction to take an account in any particular manner, (as, for example, by computing interest on sums received and paid at any given rate, either from the actual time of every such receipt and payment, or from the end of any given time after such receipt or payment, or in any other particular manner,) and to make yearly or half-yearly rests, in the taking of such account, is, that the accounts should be taken in the manner prescribed up to the end of each year or half year, and, that a balance should be struck at the [97] end of every such year, or half year, according to such mode of taking the account, and, that such balance should be considered as the balance of an account then settled; and should be carried down as the first item on the proper side of the next year's or half year's account, in the same manner as if the accounting parties had actually met, and settled the account at the end of every such year, or half year, in the manner prescribed by such direction, and carried the balance to a new account: the consequence of which will be, that, whenever any calculation of interest is directed to be made upon the sums so received and paid, the balance struck at the end of every year, or half year, will include the balance of interest as well as of principal, and in computing interest on such balance, as an item in the account of the succeeding year, or half year, such computation will include a computation of interest on interest; and therefore in the present case the late Master pursued the directions of the order by taking the account in the manner stated by his report, and would not have complied with every part of such directions, if he had taken the account in any other manner; and, if he had taken the account in the manner insisted on by the exceptions, viz. not computing any interest on the sums received and paid by the Defendant from the time he received or paid the same to the end of the half year,

in which the said receipts and payments were had and made, but at the end of each half year striking the balance of the moneys received and paid by the Defendant in the course of such half year without any calculation of interest thereon, and adding or deducting such balance to or from the balances of the former half year, calculated in the same manner, and calculating interest only on such several balances from the times when the same respectively were struck, and making such interest account a separate account, without adding the same or any part thereof, at any period, to the account of the moneys received and paid, the Master would have deviated from the express directions of the decree; which directed the computation of interest to be made from the times, when the several sums of money were received by the said Defendant; which it is evident, might, in many instances be nearly six months before the balance was struck, upon which, and from which time only, as the Defendant contends, the computation of interest should commence, and in that case, the making of rests would have no other effect than that of charging the Defendant with a smaller account of interest, than he would have been charged with, if the computation had been made of simple interest only on the sums received and paid by the Defendant from the beginning to the end of the account

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The Master further stated, that he endeavoured, but had not been able, to ascertain, that there was any general practice in the Master's offices, applicable to the particular directions of this decree: but the general understanding of the Masters, with regard to a decree directing rests to be made in taking an account, was, that such rests were to be made with a view of computing compound interest, and of charging the accounting parties in a stricter manner than that in which they would be charged, if no direction were given for rests.

The report concluded by stating, that for these reasons the Master had forborne to make any calculation of interest in any other manner than that in which the late Master had calculated interest. On that ground an exception was taken by the Defendant

The exceptions to the first report were argued by *The Solicitor-General (a)* and *Mr Steele* in support of the exceptions; and by *Mr. Richards* and *Mr. Thomson*, for the report; the exception to the report of *Mr. Cox* was supported by *The Attorney-General (b)* and *Mr. Hart*: and opposed by *Mr. Richards* and *Mr. Thomson*. [99]

In support of the exceptions it was contended, that the

(a) Sir *Thomas Manners Sutton*
(b) The Honourable *Spencer Percival*

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account was taken in a mode inconsistent with the justice of the case, and the practice of the Court. It cannot be denied, that, if a trustee has made compound interest, or more, he must account accordingly. But in this instance the Court has no ground for that inference: nor is such a case made by the bill. This will, confined expressly to the legal rate of interest, does not justify such a direction as the decree contains. The practice of the Court does not allow compound interest in ordinary cases: *Waring* v. *Cunliffe*. (c) In *Nightingale* v. *Lawson* (d) compound interest was allowed upon the particular circumstances: but Lord *Thurlow* would not give it at the rate of 5*l* *per cent.*, as it is impossible to lay out the money upon the day it was received. The latter words of this direction control the former. A direction, that rests shall be made at the end of the year, does not mean that interest is to be turned into principal, and the future calculation is to be taken upon the sum composed of both principal and interest. The Master is directed to make half-yearly rests: but he has gone much further than that direction warrants, making a rest at every receipt and payment. The order also is confined to interest upon the sums received, and does not give interest upon interest. [100] It cannot be supposed, that the Court intended interest to be calculated upon every sum received by the Defendant, without any reduction as to payments: but the order has no direction of that sort. The object of introducing the word "rests" in such an order is to enable the Master to make an allowance by some process to the accounting party for his payments. Upon yearly rests the Master calculates interest upon the last year's balance for the whole year: but then, being directed to make a rest, he ascertains all receipts and payments, strikes the balance, and adds to, or takes from, the last year's balance; and that is the balance, upon which interest is to be calculated for the next year. The Master has applied this direction as to half-yearly rests for the sole purpose of adding to the principal, and charging compound interest. There have been many cases, much stronger for compound interest: *Newton* v. *Bennet*, (a) *Perkins* v. *Baynton*, (b) *Treves* v. *Townshend*, (c) *Forbes* v. *Ross*, (d) *Littlehales* v. *Gascoigne*. (e) In no one of those very strong cases, and others that have followed, (f) was the idea of charging compound interest entertained. In *Waring* v. *Cunliffe* (g) Lord *Thurlow* was much inclined to do it if he could.

(c) *Ante*, vol. i. 99.

(d) 1 *Bro. C. C.* 440.

(a) p. 160. 1 *Bro. C. C.* 359.

(b) 1 *Bro. C. C.* 375.

(c) 1 *Bro. C. C.* 384.

(d) 2 *Bro. C. C.* 430.

(e) 3 *Bro. C. C.* 73.

(f) *Young* v. *Combe*, *Piety* v. *Stace*, *ante*, vol. iv. 101. 620. *Pocock* v. *Reddington*, *ante*, vol. v. 794.

(g) *Ante*, vol. i. 99.

The direction for rests therefore cannot be intended for that purpose. If the object was to give interest upon interest, it would have been confined to yearly rests; otherwise it comes very near usury, to which objection a contract of that nature would certainly be liable. 1805. RAPHAEL v. BOLDERO.

For the Report.—The obvious meaning of this decree is, that at the end of the half year the interest should be turned into principal from that time. As to the objection of usury, interest accrues due *de die in diem.* There is nothing illegal in making interest carry interest. It may be made payable not only half-yearly, but monthly; and in that way the principal may, at the end of the year have produced [illegible] more than *5l. per cent.* The executor may make [illegible] and it is impossible to follow it minutely; but the Court [illegible] the [illegible] it can, by fixing rests at certain times [illegible] the purpose of giving interest upon interest. [illegible] usual; but half-yearly rests may be [illegible] case, by which mode the Court gets [illegible] of the case as they can, where [illegible] particular advantage made would be [illegible] to the objection, that the [illegible] till the end of the half year [illegible] was bound to turn the interest into principal [illegible] as he could. This will [illegible] direction that the executors shall [illegible] legacies; for the Court will not attend to the subsequent words, that are supposed to give an option. The order is made according to the justice of the case. The particular nature of this case takes it out of the reach of the authorities and the general line of practice. Consider the effect of this mode of accounting, to the Defendant's gain and the Plaintiff's loss, upon two articles: his receipt, as executor, upon the 12th of *March*, 179[illegible], of 12,000*l.* from the partnership in which he was engaged, where it was producing interest, upon which he contends he is not to be charged with interest till *July*, the commencement of the following half year: 2dly, his payment of 40,000*l.* into the Bank, upon the 17th of *December*, 1791, immediately preceding the end of the half year, upon which in the same manner he insists interest is to cease from the preceding *July*. This trustee for these infants cannot now object, that the bill does not make the case. [101*] [102]

Reply.—It is impossible, upon the common practice of merchants, that the interest could be made to accumulate in this manner. Two bonds appear, executed by one of these Plaintiffs, for money advanced to them by this Defendant at 4*l. per cent.* only. If it is supposed the money was employed in discounting, for this purpose it must be supposed, that each bill was paid at the day, and at the

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moment of each payment another bill was ready to be discounted; which is impossible. If employed in trade, it was liable to losses; and that in taking the account ought to be in view. Your Lordship will not direct the account upon the principle of his having received what it is absolutely impossible he could receive.

1804. January 28.

The Lord CHANCELLOR, after the argument upon the exceptions to the first report, made the following observations:

The question, upon the exceptions to the report under this decree, is, whether the Master, in the manner in which he has calculated interest, and has acted as to that direction, has executed the decree according to the principles of the Court. This decree is represented as peculiar, in both directing interest to be computed upon the sums, as they are from day to day and time to time received, and also in directing half-yearly rests, and further, in not directing any thing as to sums paid. In the ordinary case of a mortgagee in possession there is a debt,

[103] *de die in diem* carrying interest; and it is very easy to make the proper rests, for every receipt forms a rest, in discharge, first of the interest, then of the principal. But an executor or trustee, having nothing due to him, but being to deal with the property of another, as he would be expected to deal with it in a fair course of administration, the Court must charge him from time to time with interest, making him allowances; or, if that is thought too strong against an executor, adopts a middle line, affording in general cases a chance of doing justice. The Court has been in the habit of charging interest by directing annual, or half-yearly, rests; pointing out how that interest is to be charged. What Master *Holford* has done, which is stated to be the practice of his office, is this: He has computed interest from every day, in which every sum was received by the executor That operation alone, it is obvious, charged him with simple interest at the rate of 5*l. per cent* upon all his transactions, and without any allowance for his payments. But also rests are made at the end of each half year, by stating the whole amount of the interest accruing in that half year, and adding that to the principal of the next half year. The Defendant is therefore first charged with simple interest upon every receipt, and with compound interest from half year to half year, through the whole course of the proceeding.

Upon the question, whether that is right, which is introduced by the exceptions, I am not satisfied by all the inquiry I can make, and the attention I have applied to

it. The practice is very differently understood. It is absolutely necessary, therefore, once for all to decide it, with all the information that can be procured; that the language of the Court may be uniformly understood. It is represented to be the understanding in some of the offices, that, where annual, or half-yearly, rests are directed, the result of the interest for the current half year or the whole year is carried, not into the principal, but into a separate column: so as to have a column of interest, and when you get to the end, you add that column up to the whole of the principal; and then the aggregate sum constitutes the demand against the executor. The mode adopted by *Mr. Holford*, would not be unjust, if the principle of the Court would allow it, for under such a direction for accumulation, though the Court ought to act with great indulgence upon an inquiry, whether the executor had, in a fair and *bonâ fide* management, made the most of the fund, and ought to be charged, as having made interest of principal, as soon as received, yet taking no step for years, and keeping the whole in his hands, he acts against his duty. Upon the nature of his duty compound interest ought to be given, as much as upon contract, or the usage of dealing. [104]

There is another way of putting it, which was followed in *Hall* v. *Hallet*, and appears to be the practice in *Mr. Hett's* office, which does this monstrous injustice. If, as in this case, the testator leaves 30,000*l.* to an infant of six months old, and, after maintenance and education, the executor is directed from time to time to convert the interest into principal, and, independent of that, there are other funds, quite sufficient for maintenance, the dividends of the 30,000*l.* being paid into Court every half year, the dividends would form additional principal, in the course of twenty years a great deal more than double the legacy. But, if the executor is at liberty to say, he will keep it in his own hands during the whole minority, and, at the end of it, all the Court can do, is to order the account to be taken with annual rests, the consequence, take it at 5*l.* *per cent.* is, that the executor would at the end of the first year have 31,500*l.* If that sum of 1500*l.* the first year's interest, is to be carried into a separate column, and not added to the principal, and is not to carry interest, that sum, the first year's interest, would lie in the hands of the executor twenty years, yielding no fruit to the infant. The next year he will have 3000*l.* in his hands nineteen years without interest; and so on; and, if it is considered, what the executor may make of the interest, thus long in his hands as a dead capital, the provision for him is as much as that of the infant. It is said, in this instance, if this money had been brought into Court, and laid out from [105]

1805. time to time in the funds, it would not have been more beneficial But that is all accident. It might be much more beneficial.

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The question therefore is extremely considerable; and, with so much doubt upon the meaning of a decree of this sort, to settle the practice once for all, my intention is to request the Masters, to certify to me the practice of their respective offices in executing decrees which direct accounts to be taken in this manner. If the practice varies, it ought to be settled. At the same time I suspect it will be found, there is rather more direction about interest in this decree than has been usual. I doubt, whether there ever was a decree, that both ordered interest upon every sum, as it was received, and also annual or half-yearly rests.

The reference, directed accordingly to Mr. Cox, produced the second report.

1804. August 14. *The Lord* CHANCELLOR, after the argument upon the exception to that report, pronounced the following judgment.

[106] December 12 1805. The real difficulty is how to construe the words of this decree. Upon the justice of this case, what ought to be the demand, I have very frequently and anxiously thought; and, adverting to all the cases, in which the Court has frequently considered it to be consistent with every view of moral justice, that individuals in accountable situations should pay compound interest, though it has not been the habit of the Court to give it, I have not the least difficulty in saying, that, if I had to make the decree upon this evidence, I should have charged the Defendant with compound interest He was made one of the executors, with a legacy for his trouble. The will states, in the most express manner, that the executors are to make no advantage whatsoever by keeping money in their hands; and expressly as to any such money directs legal interest: that is *5l per cent*, expressly putting *4l. per cent.* out of the question: but further, imposing upon them the necessity of parting with the money in their hands, or of paying *5l. per cent.* As to the particular fund, which is the subject of this suit, the testator expressly directs accumulation during the infancy of his children. This is not therefore a case of contract; in which you can reason upon it, as impolitic to encourage usury. It is only, that the testator places money in the hands of these persons, with an express prohibition to keep it in their own hands; and a direction expressly to place it out in some such way, that they can accumulate

interest. Therefore, by necessary consequence, they keep it against the express direction of the will. 1805.

It was argued formerly, that, if the directions of the testator had been observed as far as it was practicable, this executor would thus have been charged to a degree beyond that in which he could have made use of the money for the *cestuy que trusts*. That is strictly true. [107] It was added, that the Defendant would be contented to be understood as having laid out the money in the 3 *per cents*, as it could have been laid out; and, that the dividends should be considered as having been laid out from time to time; and therefore the Plaintiffs might take satisfaction in the mode the Court would have directed. As to the first of these considerations, if an executor, with an express trust to accumulate, comes with this sort of case, desiring the Court not to weigh it in golden scales, but to measure, by his general conduct, an honest endeavour to execute the trust, this Court would not deal out a hard measure to him But take it as a legacy to an executor, as trustee for an infant a week old, who says, he has done nothing during the whole infancy. that he has kept the money, without showing an endeavour to lay it out, or, that he had not the means: must the Court hold, that he is not to be charged in any degree, or take the strongest rule they can take? If not the former, the rule must be the latter, for there is no other. Where there is an express trust to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms, upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal; and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest. If the demand goes further than that, my opinion is, that it is not a wrong principle to go as far; and that this is a species of case, in which the Court would shamefully desert its duty to infants by adopting a rule, that an executor might keep money in his hands without being answerable as if he had accumulated: and, if the Court cannot find out, from the actual circumstances proved, that he has attempted accumulation, and the charge falls [108] more heavily upon him on that account, the fault is his own in not showing, what endeavours to improve it he had made.

It is said, the Defendant ought to be permitted to redeem himself from this, by being considered in the same situation as if the property had been laid out in the funds

Executor, bound to accumulate, charged ... account as if the money had been laid out in the funds: if it was not so laid out, or, being so, he had sold, ... advance.

and accumulated. The Court never will permit that at the conclusion of the executor's account. The consideration is very different, where at the beginning of the infancy he lays it out in safety and a course of accumulation; where in one event it may be increased vastly beyond what it may prove in a different event. The Court will not permit him to look back; and calculate, whether it is better for him to abide by that situation, in which he ought to have placed himself at the commencement of the trust. The contrary principle may be justified by analogy; for, suppose he had laid out the property in the funds, and sold out the stock at a great advance: if at the conclusion of the trust the price is less than he sold at, he could not have offered back the stock; but shall answer for the money; if that is for the interest of the *cestuy que trust*.

Upon these grounds there is no doubt, that, if, as was contended formerly by *Mr. Steele*, and is now contended by *The Attorney-General*, instead of a computation by the Master of interest upon interest half-yearly, or, as is more usual, yearly, (upon which however my judgment is bound by the decree,) the proper way is to carry out the interest into a separate column half-yearly, and then to cast up the whole, and that the Court can do no more, a different rule would be more for the advantage of these infants; and, if the decree directed simply, that interest should be calculated on each side, as the receipts and payments from
[109] time to time varied the state of the account, that would be more favourable to the infants; for the interest, so carried out into a separate column, bears no interest; as it may, if included in the general column. But the effect would be enormous injustice. Consider, what a beneficial doctrine for the executor this is; and of course unfavourable to the *cestuy que trust*. Take this fund as 30,000*l.* in the Defendant's hands: the infant *cestuy que trust* a week old. At the end of the first year the interest of that sum at 5*l. per cent.* would be 1500*l.* If that sum is carried out into a separate column, it does not carry interest for the subsequent twenty years: or, if it does carry interest at 5*l. per cent.* unless I give compound interest, in any way of putting it, the legacy is nearly as beneficial to the executor as to the infant. That cannot be permitted.

Take it another way. Suppose the executor is also guardian; and no one will file a bill against him as next friend of the infant: see the consequence. When that sum of 1500*l.* is carried out into a separate column, if a bill was filed, the next day that sum would be brought into Court, and from that moment, being principal, though produced by interest, would have carried interest

during the whole remaining period of twenty years. The principle, imposing upon the executor the duty of doing what the Court would call upon him to do, is not pressed too far; particularly, if the executor is expressly directed to act as the Court would act. Therefore it is impossible to agree to *Mr. Steele's* argument. *The Attorney-General* goes further; contending, that the direction to make annual rests does not authorize the Master to compute interest upon the column of receipts; but is inserted, in order that the Court may be able, having regard to the magnitude of these sums, to reason upon the practicability of the executor's making interest of that interest: or on the other hand to say, they may fairly be considered such sums, and of such a nature, that he could not be called upon to make principal of them. [110]

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With regard to the practice, I was amazed to find, how little the meaning of this direction to make rests was understood. I was surprised to hear it asserted, that rests are never made to reduce an account, but only to increase an account, for in the case of receivers, and all persons accountable, I have known those words inserted. In general cases I believe rests are made in order to see, whether interest is to be charged, or not. In this instance the Court is bound to permit a computation of interest to be made upon the sums from the times they were received; making rests from the times they were received "in that computation:" the more bound, as the decree directs the account of the personal estate to be taken; and in that account expressly, at what time the sums were received. But, if the meaning is as *The Attorney-General* contends, and the Master ought not to have added interest upon the balances of interest without the Court's direction, I should have thought the Defendant ought to have been so charged; and the proper mode of taking the account is the mode in which it has been taken, and that reduces it to a mere point of form. As to the bonds (*a*) now produced, that is a consideration proper to be disposed of out of Court: but, where there is a general fund, belonging, not to one, but to a body of Plaintiffs, and the direction must apply to the whole, without reference to the transactions with some of them, the Court must adopt a rule applicable to all, and the other is a separate transaction.

That brings it to the meaning of Lord *Rosslyn's* decree, which is expressed in terms, that, I apprehend, were never before inserted, and, I hope, never will again be found, in any decree. The mode of directing the ac- [111]

(*a*) Bonds for money lent by the Defendant to some of the Plaintiffs at interest.

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THELLUSSON v. WOODFORD.

The appellants, the widow and children of the testator, appealed from the decree for the following REASONS:

That the trust, attempted to be created by *Mr. Thellusson's* will, being of the class of executory trusts created by will, must depend for its validity on its being instituted for those purposes, and limited within those boundaries, which the law prescribes for trusts of that description: but it was neither instituted for those purposes, nor limited within those boundaries.

1st. It is not instituted for the purposes which the law prescribes for those trusts.

[114] The nature of it is to create an equitable estate of inheritance, commencing at a future time, without limiting an intermediate equitable estate, commensurate with the interval. By the old law limitations of this kind were illegal. For the purpose of enabling parties to provide for those reasonable occasions of families, which could not be provided for, except by allowing future estates of freehold to be limited without a limitation of such a previous intermediate estate, they were first admitted into wills, and afterwards, when uses were introduced, the uses raised by them were admitted among those which, on account of the fairness and utility of their object, Courts of Equity thought binding on the consciences of trustees, and the performance of which they would on that ground compel by subpœna. Thus the circumstance of the limitation, created for the meritorious purpose of providing for the reasonable occasions of families was the ground, on which the uses raised by these limitations were admitted among those, which Courts of Equity would execute; and of course, when they are not created for a purpose of that nature, the ground for the interference of Courts of Equity does not arise. In the present case there is no such ground. *Mr. Thellusson's* will is morally vicious; as it was a contrivance of a parent to exclude every one of his issue from the enjoyment even of the produce of his property during almost a century; and it is politically injurious, as during the whole of that period it makes an immense property unproductive both to individuals and the community at large; and by the time, when the accumulation will end, it will have created a fund, the revenue of which will be greater than the civil list, and will therefore give its possessor the means of disturbing the whole economy of the country. The probable amount of the accumulated fund, in the events, which have happened, is stated in the appellant's bill, and admitted in the answer, to be 19,000,000*l.*; and in

[115] case any of the persons, answering the description of heir male, when the period of suspense ends, should be a minor, and his minority should continue ten years, it

would increase the amount of that third to the sum of 10,802,373*l.*: so that, if the whole property should centre in one person, and that person should have a minority of ten years, after the end of the period of suspense, (a circumstance by no means improbable, particularly as *Mr. George Woodford Thellusson* has been long married and has no son,) the whole accumulated fund will amount to 32,407,120*l.*

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2d. The trust is not confined within that boundary, which the Law prescribes for trusts of that description (even though it be admitted, that all the lives, during which the accumulation is to be carried on, were in existence at the time of *Mr. Thellusson's* decease,) as one circumstance, which materially affects the period of suspense, and which enters into every case, in which the suspense of property has been held legal, does not enter into the present case.

In examining the cases decided on limitations of this kind, it will appear, that in every one of them all the lives, during which the period of suspense is directed to be carried on, are confined to [illegible] sons, immediately connected with or immediately leading to the person, to whom under the trust, first wanted to take effect at the end of the suspense, the property was to vest. Thus, (to instance the two cases, in which the accumulation was supposed to have been furthest carried on,) in that of Lady *Denison's* will, as *Mrs. Blackden*, during whose life the property might be in suspense, was the mother of the second son, to whom the property was devised, and in *Long* v. *Blackall* (a) the testator's posthumous son was immediate ancestor to the heir, to whom the property was directed to vest: but in the present case not one of the first lives has an immediate connexion with, or immediately leads to the person benefited. In the sense we are speaking of, the life of any stranger was equally connected with, and would equally lead to, "the "respective male descendant of the testator's sons," as the lives assigned by him for the period of suspense. A material difference therefore in a point, considerably influencing the purpose and boundary of the suspense, exists between the present and all the decided cases.

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3d. The use made by *Mr. Thellusson* of the rule, allowing a suspense of the absolute ownership of property to be carried on for any number of lives in being, is a fraud on the rule.

It is a maxim of Law, which admits of no exception that nothing shall be affected by indirect means, which

(a) In the Register's Book, under the title [illegible] v. [illegible], [illegible] 1786. [illegible] p. 115. [illegible] vol. [illegible] R. [illegible] 100.

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cannot be done in a direct manner. Now a possible suspense of property for twenty-five years was held to be void in Sir *John Lade's* case, (b) and in the late case of *Porter* v. *The Bishop of Bath and Wells*, (c) the Court of Common Pleas unanimously decided against the legality of a possible suspense of property for twenty-four years. Where property is suspended through the medium of lives, if the lives be those of persons connected with the ultimate owner, the persons whose lives form the period of suspense, will generally be the parents of the parties ultimately benefited, and will not therefore be more than one or two lives at the utmost. Now the probable dura-

[117] tion of one or two such lives falls short of twenty-one years, but, if an unlimited number of lives be taken, they will reach a century. It is observable, that the probable duration of the lives assumed by *Mr. Thellusson* reaches seventy years. Thus, therefore, if the rule be taken to extend to any number of lives, it will follow, that though, where a number of years directly constitute the term of suspense, property cannot be suspended from vesting absolutely during twenty-five years, according to the determination in Sir *John Lade's* case, or during twenty-four years, according to the case of *Porter* v. *The Bishop of Bath and Wells*, yet by assuming for the period of suspense a number of lives, whose average duration is equal to a given number of years, and thus indirectly making years not lives to constitute the period of suspense, property may be suspended for a whole century, and the present will be cited on future occasions, as a case in point for extending the period of suspense to seventy years. Thus *Mr. Thellusson's* will is a fraud on the rule. When in the Duke of *Norfolk's* case (a) Lord *Nottingham* pronounced for the legality of an executory limitation, which kept the absolute ownership of a term of years in suspense for one whole life, and thereby extended the period allowed for the suspense of a term beyond what had been decided for it in the preceding case of *Child* v. *Bayley*, (a) the possibility of the abuse of that extension of executory limitation was strongly pressed upon him, and he answered it in these remarkable words: "It has been "urged at the Bar, where will you stop, if you do not "stop at *Child* and *Bayley's* case? I answer, I will stop "every where, when any inconvenience appears, no "where, before. It is not yet resolved, what are the ut-

(b) *Lade* v. *Holford*, 1 Bl. 428 [illegible] *Burr.* 1416.
(c) [illegible] *H. Bl.* [illegible]
(a) [illegible] p. 11[illegible] 3 *Chan. Ca.* 1. 2 *Chan. Rep.* 229. 2 *Freem.* 72. 80 *Pol.* [illegible] 104, and Lord *Nottingham's* MS in Mr. *Hargrave's* possession.
(a) [illegible] *Cro. Jac.* 15[illegible] 1 *Rol. Ab.* 612. *Palmer*, 48. 3[illegible] 2 *Rol. Rep.* [illegible] [illegible]

"most bounds of limiting a contingent fee upon a fee; and it is not necessary to declare, what are the utmost bounds to a springing trust of a term: whenever the bounds of reason or convenience are exceeded, the law will quickly be known." The use made by *Mr. Thellusson* of the rule is, both in a private and public view, unreasonable and inconvenient; and is still more objectionable, as by carrying on indirectly an accumulation for seventy years, which directly could not be carried on for one-third of such a number of years, it is a fraud on the rule itself. Here, therefore, the time pointed out by Lord *Nottingham* is come; and it is necessary, that it should be known, that the rule is to be understood with this limitation; that, whenever from the number or quality of the lives chosen it is evident, that accumulation, and not a family purpose, is the object of the trust, the bounds of the reason and convenience of the rule are exceeded, and a fraud has been practised on the rule. It is objected to this conclusion, that any inquiry into the reasonableness, convenience, or fairness, of the use made of the rule must lead to uncertainty, and to an exercise of discretion, which the Bench has always disclaimed: but this does not follow. As much uncertainty and as great an exercise of discretion, attend all decisions upon unconscionable contracts, as will attend decisions on the reasonableness, convenience, and fairness of the use made of the rule in question. A contract may be objectionable for its unreasonableness and unfairness, without being objectionable on the ground of either to such a degree, as will induce a Court of Equity to rescind it: but still there is a degree, in which Equity will interfere. "To set aside a conveyance there must," Lord *Thurlow* said in the case of *Gwynne* v. *Heaton*,(a) "be an inequality so strong, gross, and complete, that it must be impossible to state it to a man of common sense without producing an exclamation of the inequality of it." So, in respect to the rule in question, it may be much abused, without a Court's being justified in taking notice of the abuse; but when the abuse is so strong, gross, and complete, that every man of common sense, to whom it is stated, must exclaim against it, the case supposed by Lord *Nottingham*, is come; and Equity will interfere to set it aside. That the rule has been strongly, grossly, and completely, abused in the present case, appears not to be doubted.

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4th. The trust is not limited within those boundaries, which the Law requires for trusts of this description; because the will attempts to protract the accumulation during the lives of persons unborn at the time of the testa-

(a) 1 *Bro. C. C.* 1.

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tor's decease, the testator having selected for that purpose the lives of such persons as might not be born till within the time after his decease, and the persons thus described cannot be considered as persons actually born in his lifetime.

It is true, that for some purposes, as, at the Common Law to take by descent, and by 10 and 11 *William III* c. 16, to take by way of remainder, a child, who is *en ventre sa mere*, when the estate designed for him would devolve upon him, if he were born, becomes entitled to it, after he is born, and may then enter upon it, and devest it from the first taker. But his title to enter upon the estate, after his birth, is not a consequence of his supposed existence during the time he was *en ventre sa mere*, but because in the case of his taking by descent the Law, at the instant of his birth, invests him, though a posthumous child, with the character of heir, and consequently with all the rights of heirship: and because when he claims by way of remainder, it is expressly provided by 10 and 11 *Wil.* III. c. 16, that the remainder shall vest in him upon his birth. If the Law considered him to exist before his
[120] birth, the freehold during the time of his being *en ventre sa mere*, would be vested in him in the eye of the Law, and for the purposes of Law: but that clearly is not the case, for while he is *en ventre sa mere* the Law vests the freehold in the intermediate taker, as heir, with every right and burthen of heirship, so that after the birth of the nearer heir, he even retains the profits of the estates against him. That class of lives, therefore, which is now the subject of observation, neither had nor could have an existence, either in fact, or in Law, in the lifetime of *Mr. Thellusson*. It follows, that by the admission of them into the term of suspense, the boundary prescribed by Law for the suspense of real property, has been exceeded. No cases, the subject of which is real property, can be mentioned, in which a child *en ventre sa mere* has been held to be in existence for any purpose, except to limit the estate of the first devisee, or for the actual benefit of the child himself, being the substituted devisee. In *Bennett* v. *Honywood*, (a) Lord *Bathurst* declared, that the Court had never construed a child *en ventre sa mere* to be actually born at the time of the death of the testator, except in the case of a devise to the children. Cases upon trusts of personal estates are not applicable to cases of the present description, arising on devises of real estates; for those rules of Law, respecting real estates, which require, that an estate of freehold should be actually vested in some person, and therefore deny a legal existence to a

(a) Ambl. 708.

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child *en ventre sa mere*, even for his own benefit, are in no wise applicable to trusts of personal estate. The case of *Long* v. *Blackall*, (h) is the only case, where the lawfulness of making a child *en ventre sa mere* a life for the purpose of suspense, appears to have been admitted; but that was a case of personal estate. Now, as there is no law, which denies a legal existence to a child *en ventre sa mere*, where personal estate is concerned, it is urged, especially where, as in *Long* v. *Blackall*, it gave effect to a

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provision made by a parent for a child,) that there is strong ground to contend, that a child *en ventre sa mere* shall, in the eye of the Law, be supposed to exist for his own benefit, and that there should be a strong disposition in the Courts to favour such an argument. But in the present case, from the impossibility of supposing the benefit to be in the child, while *en ventre sa mere*, the argument is wholly inapplicable.

Admitting, however, that the lives in question were, for some purposes of Law, in existence in the lifetime of *Mr. Thellusson*, they certainly were not in existence for the use he made of them. In the cases, where the nine months have been mentioned, as a period allowed for protracting the suspense of property, it is generally added, that the nine months were allowed for the sake of the posthumous child, intended to be benefited by the protraction. Not a single instance can be produced, where the nine months have been added for any other purpose, and perhaps an instance cannot be brought, where the Courts have had occasion to mention the nine months, without adding at the same time, that they were allowed merely for the benefit of the posthumous child. Then how does the argument stand? A posthumous child is in fact unborn at the testator's decease. The Law allows that, when after his birth he answers the character of heir, taking by descent, and also in some cases, especially provided for by Act of Parliament, his being *en ventre sa mere* shall not deprive him of an estate, to which, if actually born at the time of its devolution, he would have been entitled. To argue from this, that for all purposes, and particularly for purposes, which, as in the present case, operate to their prejudice, posthumous children shall, in the supposition of Law, be thought in existence, is unjustifiable.

5th. In other respects the suspense evidently extends beyond the lives of persons in being at the testator's decease. [122]

The classes of lives are described by the testator in the following words: 1st. "During the natural lives of my

(h) *Ante*, vol. iii. 486. 7 T. R. 100.

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"sons, *Peter Isaac Thellusson, George Woodford Thellusson,* "and *Charles Thellusson*:" 2d. "And of my grandson "*John Thellusson* son of my said son *Peter Isaac Thel*-"*lusson*:" 3d. "And of such other sons as my said son "*Peter Isaac Thellusson* now has or may have:" 4th. "And "of such issue as my grandson *John Thellusson* son of "my said son *Peter Isaac Thellusson* may have:" 5th. "And of such issue as any other sons of my said son "*Peter Isaac Thellusson* may have:" 6th. "And of such "sons as my said sons *George Woodford Thellusson* and "*Charles Thellusson* may have:" 7th. "And of such issue "as such sons may have as shall be living at the time of "my decease or born in due time afterwards."

The question is, whether all the lives, mentioned in this part of the will, must necessarily have been in existence in the lifetime of the testator: or, whether some of them might come into existence after his decease? On the last supposition, the devise is evidently too remote. Now unless the words in the 3d, 4th, 5th, 6th, and 7th members of the sentence are restrained by the qualifying words, "as shall be living at the time of my decease or "born in due time afterwards," which are introduced at the end of the last member of the sentence, they manifestly extend to persons, who might be born after *Mr. Thellusson*'s decease. But the qualifying words cannot, upon any principle either of grammatical or legal construction apply to them. In common sense, by every rule of grammar, and according to every principle and prece-
[123] dent of legal construction, words of relation are always exclusively referred to the next immediate antecedent, unless such exclusive reference embarrasses the sentence. But in the present case the sentence will not only not be embarrassed by confining the reference in the last member of the sentence to the next immediate antecedent in that sentence, but the sentence will be embarrassed in an extreme degree by extending the reference to any prior member of it. It will not be embarrassed by confining the reference to the last antecedent in the last member of the sentence, for every member of the sentence will then be complete in itself; every member will have its word of relation, and an antecedent word, to which it explicitly refers: but it will be embarrassed in an extreme degree by extending the reference to the prior members of the sentence. The restrictive words cannot be applied to the first or second members of the sentence without making them absolute nonsense. This alone leads to the conclusion, that they were not to be referred to the other members of the sentence, especially as without them and standing by itself, each of those members is perfect. If the restrictive words are referred to the third and fourth

members of the sentence, one-half of them must be omitted, or the reference will make them perfect nonsense, for the words "born in due time afterward," can never be referred to the words "now has," as it is impossible that a testator, speaking of sons living, when his will is made, can describe them as sons born in due time after his decease. The fifth member of the sentence is complete without the restrictive words; they do not, however, make nonsense of it, but then they leave it altogether open to the full force of the objection, as by every rule of construction the restrictive words, if they are applied to that member of the sentence, must be referred to the "sons" mentioned in it, and not to the "issue of the sons." It is impossible to suppose, that a testator, of the age of sixty-four, at the time he made his will, should have had it in his contemplation to provide for the [illegible] of such sons, [illegible] time of his decease [illegible] of his body, [illegible] that [illegible] the restrictive words to the sons [illegible] in the fifth member of the sentence [illegible] No [illegible] referred to the word "sons" [illegible] left unqualified, and then [illegible] be reckoned all the issue of the sons, whenever [illegible] It is apprehended, that this is the [illegible] and that the legal [illegible] therefore [illegible]

6th. Fourthly, the testator exceeds the bounds prescribed by law for the suspense of property, in the clause, by which he directs the property to be [illegible] till purchases can be found.

The proper and only legal mode of declaring the trusts of these investments, for the purposes [illegible] in the contemplation of the testator, is directing the dividends and annual produce of them to be applied to the persons, and in the manner, to which if lands were actually purchased and settled, conformably to the trusts, the rents of them would be applicable. This the testator does not, but on the contrary expressly directs the accumulation to be carried on, till the purchases are actually made; so that the beneficial ownership of the property will be suspended, not only till the lives, during which it is directed to be accumulated, shall expire, but during such further period of time as may elapse between the decease of the last surviving life and the completion of the last purchase.

J. MANSFIELD.
S. ROMILLY.
C. BUTLER.

1799.
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1805.
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The respondents, the devisees in trust, insisted, that the decree ought to be affirmed, for the following REASON:

The validity of the disposition, made by the late Mr. *Thellusson* of that part of his real and personal estate, which is the subject of the present appeal, depends solely on the question, whether the period, during which he directed the enjoyment of the property to be suspended, and the accumulation of the rents and profits of it to be carried on and continued, exceeds the bounds, allowed and established by the laws of *England* for the suspension of the beneficial dominion of property, and the complete and absolute power of disposing thereof. As the law stood at the time of Mr. *Thellusson*'s decease, it was perfectly settled, that the absolute vesting of property might be postponed, and the accumulation of it continued, during the lives of persons in being, and the life of the survivor of them, and for twenty-one years after the survivor's decease, and a further number of months, equal to the duration of pregnancy. Now the term of suspense and accumulation, directed by Mr. *Thellusson*, is confined to the lives of persons in being at the time of his decease, or born in due time afterwards, *i. e. en ventre sa mere* at his decease, and the life of the longest liver of them; and thus, being confined to lives in existence at the death of the testator, or to come into existence within the period of gestation immediately after his death, without any reference to any further number of years, it not only does not exceed, but it falls short of, that boundary, to which, according to established rules, it might have been lawfully protracted.

A. PIGGOTT.
N. RIDLEY.

[126] The respondents, *William Thellusson* and *Frederick Thellusson*, and *Edmund Thellusson*, *Alexander Thellusson*, *Arthur Thellusson* and *Thomas Thellusson*, being infants, submit their rights and interests under the said will, so far as they are or may be affected by the said appeal, to the consideration of their Lordships, and, in case their Lordships shall be of opinion, that the limitations in the said will may be modified and altered in such a manner as to give effect to the general intent of the testator, the said respondents humbly submit, that they may eventually be entitled to the whole or to a share in the said testator's devised estates.

T. M. SUTTON.
S. C. COX.
R. RICHARDS.
C. THOMSON.

The respondent, His Majesty's *Attorney-General*, trusted, that the said decree will be affirmed, for the following, among other, REASONS:

1. The only question is, whether the testator has transgressed any of those rules of Law or Equity, which were sanctioned and established by decisions of Courts of Justice at the time when he made his will? That an executory devise is good, which is to take effect in possession after the determination of any number of lives of persons actually born, and after the death of a child *en ventre sa mere*, (allowing for the period of gestation of such child,) is a rule, which cannot now be shaken, without shaking the foundation of the Law. In the present case on the determination of only nine lives there will be a vested estate in possession, and the vesting therefore of the property in question is not postponed for a longer period than the Law allows. There is nothing in this case, which in technical language tends to a perpetuity. An estate may be limited to one for life, remainder to another for life, remainder to a third, and so on to twenty persons for life; nay a settlement has, by the directions of a Court of Equity, been made, limiting an estate to fifty persons in being for their successive lives; (*a*) and no inconvenience has ever been apprehended from such limitations. The rule has been laid down in plain and intelligible terms, with reference to the very circumstance of the number of lives, that it does not signify how great the number of lives is, for it is but for the life of the survivor, and therefore but for the life of one person. A man may appoint 100 or 1000 trustees, and, that the survivor shall appoint a life-estate. That would be within the line of a perpetuity. The Judges have never been aware of the difference between one life and twenty lives. Every executory devise is good, that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which cannot be rendered unalienable beyond the time, at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of twenty-one. The Court has no criterion to judge of the inconvenience, arising from restraining the alienation of property by executory devise, except by analogy to the restraint, which the Common Law allows to be put on the alienation of real property. (*b*) 127

2. The notion, that an executory devise is good or bad, according to the number of lives, after which it is to take

(*a*) *Humberston* v. *Humberston*, 1 *P. Wms.* 332.

(*b*) *Love* v. *Windham*, *Sid.* 450. 3 *Ch. Ca.* [illegible]. *Humberston* v. *Humberston*, 1 *P. Wms.* 332. *Scattergood* v. *Edge*, 1 *Salk.* [illegible]. 12 *Mod.* 278. 2 *Bro. Ch. Cas.* 30.

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effect, never occurred to any Judge or Lawyer until the present case, nor can such a notion be supported, unless it shall be determined, that a Judge is to decide upon the particular circumstances of each particular case; and that he is not to look for a general rule, but * for particular instances, in which the general rule has been acted upon. [* 128] In the Duke of *Norfolk's* case (a) Lord *Nottingham*, so far from deciding upon the principle, that executory devises must depend upon the rule of convenience or inconvenience, has positively declared, that he intended to confine executory devises and trusts within the limits of estates tail, and without any exception he gave the same limitation to executory devises, and trusts The extent of the property, the cruelty or kindness of the disposition, cannot be permitted to operate upon the decision of a Court of Justice. The intention of the testator in this case is clear and certain It is consistent with the rule of law. That intention cannot be controlled by ideas of its fitness or unfitness, of its policy or impolicy. The intention of the testator is consistent with the settled rules of Law at the time when his will was made, and therefore the will must be established

3 The objection, that the doctrine of executory devises is not applicable to a trust of accumulation, is totally unfounded The attention of a Court of Equity has been frequently directed to a trust of accumulation There are many cases, in which accumulation has been directed by the Court, because the testator has expressly directed it, (b) others, in which it has been directed, because the will contained indications of such an intention, (c) and others, in which the attention of the Court has been so particularly called to the legality of the accumulation directed, as to fix the period beyond which such accumulation was not to extend. [129] The objection has never been before made, even in argument, except in the case of Lady *Denison's* will, when it was raised in argument, but without success (a) It has always been considered in the power of a testator to direct an accumulation of the rents and profits of his estates for the same period of time, during which the law allows a testator to render his estate unalienable It that is not the period, during which the trust of accumulation is to continue, what other period is to be substituted? May the accumulation be permitted for one life, or for three lives, or for twenty?

(a) 3 Ch Cas 1 2 Ch. Rep 229. 2 Freem 72. 80. *Pollex Rep.* 223 Lord *Nottingham's* MSS

(b) *Hopkins* v *Hopkins*, 1 *Vern.* 268 *For* 44. 1 *Atk.* 581 1 *Ves* 262 Mr. *Butler's* note, 231. *Co. Lit.* 271, b

(c) *Gibson* v *Lord Montfort*, 1 *Ves.* 485.

(a) p 129 *Harrison* v. *Harrison*, 21st *July*, 1786.

Different Judges may entertain very different opinions upon the subject. One good life may be more than equal to fifty bad lives. The rule, therefore, which can neither be extended nor contracted, is laid down by the Law; and is, that accumulation may go on during that period of time, during which the Law permits the estate to remain unalienable. The Law does not regard the quantity of property accumulated; but anxiously provides, that, when accumulated, it shall not remain unalienable beyond a period clearly marked out and defined.

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4. With respect to the objection, that a child *en ventre sa mere* is not a life in being for the purpose of suspending the absolute vesting of an estate, it is clear, that such children are considered by law as in being for a variety of purposes. They are considered as in being at the death of an intestate, in order to be entitled to take under the Statute for Distribution of Intestates' Estates: they are capable of taking by descent estates in fee simple or in fee tail. It is admitted, that they are to be considered as in being for such a purpose as the present. The whole foundation for the argument, that such children are to be considered as in being for their own benefit only, rests upon some words, which some reporters of decisions have ascribed to Judges, when delivering their opinions upon claims made by such children. But these words, if they were used in those cases, by no means negative the proposition, that such children are in being for all purposes. There is no reason for confining the rule. They are entitled to all the privileges of all persons; and it is reasonable, that they should be the means of conferring privileges upon other persons. But the Law considers such children as in being in cases, in which they may be prejudiced. They may be vouched in a recovery; (a) though such vouchee is for the purpose of making them answerable over in value. They may be executors. Such a child has been considered in being for such a purpose as the present in *Long* v. *Blackall*, (b) which is a complete decision on the very point. Supposing, that the case of *Long* v. *Blackall* has not settled the point, the words in the testator's will "born in due time afterwards" afford a principle of construction, sufficient to maintain the point. Those words must be taken in construction of law as describing that period, during which persons may come *in esse*, for whose lives according to law the accumulation may go forward.

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5. With respect to the objection, that the words of restriction in the will "as shall be living at the time of

(a) *Co. Litt.* 390, a. (b) *Ante*, vol. iii 486. 7 *Term Rep.* 100

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"my decease or born in due time afterwards" are, according to just construction, to be confined to the last class of persons, during whose lives the accumulation is to be, and cannot, according to the rules of construction, be carried back to any of the preceding classes, it is submitted, that the clause of restriction cannot be disconnected from all the descriptions of persons, whose lives
[131] are specified. It is one sentence; and the qualification is applicable, and must be applied, to the whole. Strict grammatical construction is not the rule, which governs in wills, if the intention of the testator requires a different construction: and this sort of construction applies to all cases, whether the testamentary disposition be contrary to, or consistent with, what may be considered as worthy of favour, that the intention of the testator, if it is not inconsistent with the rules of law, is alone to be attended to. It is impossible to read the clause in question, with a view to discover the meaning of the testator, without being convinced, that the testator meant to apply the restrictive words to all the members of the clause, that should require such restriction. The adding the restriction, after the enumeration of the last class of persons, was not because it was intended to apply to that only, but in order to avoid the frequent repetition of it.

6. As to the objection, that the testator has exceeded the bounds, prescribed by law for the suspense of property, in the clause, by which he directs the property to be invested in the funds, until purchases can be found, if such objection is now to be repeated, the answer is, that such is the case in every will, where there is a direction to lay out an accumulating fund of principal and interest in lands. It is always in this way; that, until the purchase can be made, the money is to be accumulated. Where an accumulating fund is to be made the ground of purchase, the interest and dividends, until the purchase is made, are never directed to be paid to the person, who would be entitled to the rents and profits of the lands to be purchased.

EDW. LAW.
SP. PERCEVAL.
J. CAMPBELL.

[132] This case was argued, on several days, at the Bar of the House, by *Mr. Mansfield*, and *Mr. Romilly*, for the Appellants, and by *The Attorney-General*, (a) *The Solicitor-General*, (b) *Mr. Piggott*, *Mr. Richards*, *Mr. Alexander*, and *Mr. Cox*, for the Respondents. After the argument

(a) The Hon. *Spencer Perceval* (b) Sir *T. M. Sutton*.

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the following questions were proposed to the Judges on the motion of The Lord *Chancellor*. (c)

1st. A testator by his will, being seised in fee of the real estate, therein mentioned, made the following devise: "I give and devise all my manors, messuages, tenements, "and hereditaments, at *Brodsworth* in the County of "*York* after the death of my sons *Peter Isaac Thellusson* "*George Woodford Thellusson* and *Charles Thellusson* and "of my grandson *John Thellusson* son of my son *Peter* "*Isaac Thellusson* and of such other sons as my said son "*Peter Isaac Thellusson* may have and of such sons as my "said sons *George Woodford Thellusson* and *Charles Thellusson* may have and of such issue as such sons may have as "shall be living at the time of my decease or born in due "time afterwards and after the deaths of the survivors "and survivor of the several persons aforesaid to such "person as at the time of the death of the survivor of "the said several persons shall then be the eldest male "lineal descendant of my son *Peter Isaac Thellusson* "and his heirs for ever."—At the time of the testator's death there were seven persons actually born, answering the description mentioned in the testator's will, and there were two *en ventre sa mere* answering the description; if children *en ventre sa mere* do answer that description. All the said several persons, so described in the testator's will, being dead, and, at the death of the survivor of such several persons there being living one male lineal descendant of the testator's son *Peter Isaac Thellusson*, and one only. Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words, in which the same is expressed, to the said manors, messuages, tenements, and hereditaments, at *Brodsworth*? [133]

2d, If at the death of the survivor of such several persons, as aforesaid, such only male lineal descendant was not actually born, but was *en ventre sa mere*, would such lineal descendant, when actually born, be so entitled?

The unanimous opinion of the Judges was pronounced by the Lord Chief Baron MACDONALD. The other Judges present were Lord *Ellenborough*, *Grose*, *Le Blanc*, *Heath*, *Rooke*, *Chambre*, Barons *Thompson* and *Graham*. Since the argument Lord *Alvanley* had died, and Baron *Hotham* resigned: the former being succeeded by Sir *James Mansfield*; the latter by Sir *T. M. Sutton*. *June*

Sir A. MACDONALD, Chief Baron.—The first objection to the will is, that the testator has exceeded that portion

(c) Lord *Eldon*

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of time, within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law; for three reasons: First, because so great a number of lives cannot be taken as in the present instance, to protract the time, during which the vesting is suspended, and consequently the power of alienation is suspended: Secondly, that the testator has added to the lives of persons, who should be born at the time of his death, the lives of persons, who might not be born: Thirdly, that, after enumerating different classes of lives, during the continuance of which the vesting is suspended, the testa-
[134] tor has concluded with these restrictive words, "as shall be living at the time of my decease or born in due time afterwards," and that, as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grandchildren, and their issue, and so make this executory devise void in its creation, as being too remote. With respect to the first ground, viz. the number of lives taken, which in the present instance is nine, I apprehend, that no case or *dictum* has drawn any line as to this point, which a testator is forbidden to pass On the contrary, in the cases, in which this subject has been considered by the ablest Judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation during any one life; and that in fact the life of the survivor of many persons named or described is but the life of some one. This was held without dissent by *Twisden* in *Love* v. *Wyndham*, (a) twenty years before the determination of the Duke of *Norfolk's* case; who says, that the devise of a farm may be for twenty lives, one after another, if all be in existence at once By this expression he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord *Nottingham* as to the time, within which the contingency must happen, he thus expresses himself:
"If a term be devised, or the trust of a term limited,
"to one for life with twenty remainders for life succes-
[135] "sively, and all the persons are in existence and alive at
"the time of the limitation of their estates, these, though
"they look like a possibility upon a possibility, are all
"good, because they produce no inconvenience: they

(a) 1 *Mod.* 50.

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"wear out in a little time." With an easy interpretation we find from Lord *Nottingham*, what that tendency to a perpetuity is, which the policy of the Law has considered as a public inconvenience; namely, where an executory devise would have the effect of making lands unalienable beyond the time, which is allowed in legal limitations; that is, beyond the time, at which one in remainder would attain his age of twenty-one: if he were not born when the limitations were executed. When he declares, that he will stop where he finds an inconvenience, he cannot consistently with sound construction of the context, be understood to mean, where Judges arbitrarily imagine, they perceive an inconvenience; for he has himself stated, where inconvenience begins, namely, by an attempt to suspend the vesting longer than can be done by legal limitation. I understand him to mean, that, wherever Courts perceive, that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same, but no greater, latitude to executory devises and executory trusts as to estates tail. This has been ever since adopted In *Scatterwood* v. *Edge*(a) the Court held, that an executory estate, to arise within the compass of a reasonable time, is good; as twenty or thirty years so is the compass of a life or lives, for let the lives be never so many, there must be a survivor, and so it is but the length of that life In *Humberston* v. *Humberston*, (b) where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence, Lord *Cowper* restrained that devise within the limits assigned [136] to Common Law conveyances, by giving estates for life to all those, who were living, (at the death of the testator,) and estates tail to those, who were unborn; considering all the co-existing lives, (a vast many in number,) as amounting in the end to no more than one life. His Lordship was in the situation alluded to by Lord *Nottingham*, where a visible inconvenience appeared. The bounds prescribed to limitations in Common Law conveyances were exceeded: the excess was cut off: and the devise confined within those limits. Lord *Hardwicke* repeats the same doctrine in *Sheffield* v. *Lord Orrery*; (a) using the words "life or lives" without any restriction as to number. Many other cases might be cited to the like effect; but I shall only add what is laid down in two very modern cases. In *Gurnall* v. *Wood*(b) Lord Chief Justice *Willes* speaks of a life or lives without any qualification; and Lord *Thurlow*, in *Robinson* v. *Hardcastle*, (c) says, that

(a) 1 *Salk.* 229.
(b) 1 *P. Wms.*
(a) p. 136 3 *Atk.* 282.
(b) *Willes*, 211
(c) 2 *Bro. Ch. Cas.* 30

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a man may appoint one hundred or one thousand trustees, and that the survivor of them shall appoint a life estate. It appears then, that the co-existing lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered, that, when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described; and will be supported or avoided accordingly. But it is contended, that in these and other cases the persons, during whose lives the suspension was to continue, [137] were persons immediately connected with, or immediately leading to, the person, in whom the property was first to vest, when the suspension should be at an end. I am unable to find any authority for considering this as a *sine qua non* in the creation of a good executory trust. It is true, that this will almost always be the case and mode of disposing of property, introduced and encouraged up to a certain extent, for the convenience of families, in almost all instances looking at the existing members of the family of the testator and its connexions. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle, that renders such an ingredient necessary. The principle is the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, vested or contingent, or have not; nor, whether the lives are those of persons immediately connected with or immediately leading to that person, in whom the property is first to vest: terms to which it is difficult to annex any precise meaning. The policy of the Law, which, I apprehend, looks merely to duration of time, can in no way be affected by those circumstances. This could not be the opinion of Lord *Thurlow* in *Robinson* v *Hardcastle*: nor is any such opinion to be found in any case or book upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice *Willes* (a) with his usual accuracy and perspicuity:

"Executory devises have not been considered as mere "possibilities, but as certain interests and estates; and "have been resembled to contingent remainders in all [138] "other respects: only they have been put under some

(a) Willes, 214

"restraints, to prevent perpetuities As at first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child *en ventre sa mere* at the time of the father's death, because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience, and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetuity."

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Comparing what the testator has done in the present case with what is above cited, it will appear, that he has not postponed the vesting even so long as he might have done

The second objection, which has been made in this case, is, that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. It becomes, therefore, necessary to discover, in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation. What is to be intended by these words in this will must be collected from the will itself. It may be collected from the will itself, that by those words the testator meant to describe the period of time, within which issue might be born, during whose lives the trust might legally continue, or, in other words, whom the Law would consider as born at the time of his decease. These could only be such children of the several persons named as their respective mothers were *enseint* with at the time of his death. He may have meant to use the word "due" as denoting that period of time, which would be the necessary period for effecting his purpose. This is probable from his using the same word, as applied to the time, during which the presentation to the living of *Marr* might be suspended without incurring a lapse. That a child *en ventre sa mere* was considered as in existence, so as to be capable of taking by executory devise, was maintained by *Powell* in the case of *Loddington* v. *Kime*, (a) upon this ground; that the space of time between the death of the father and the birth of the posthumous son was so short that no inconvenience could ensue. So in *Northey* v. *Strange* (b) Sir *J. Trevor* held, that by a devise to children and grandchildren an unborn grandchild should take. Two years after Lord *Macclesfield* in *Burdet* v. *Hopegood* (c) held, that, where a devise was to a cousin, if the testator should [139]

(a) 1 *Ld. Raym.* 207 (b) 1 *P Wms* 340. (c) 1 *P Wms.* 486

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leave no son at the time of his death, a posthumous son should take, as being left at the testator's death. In *Wallis* v. *Hodgson (d)* Lord *Hardwicke* held, that a posthumous child was entitled under the Statute of Distributions; and his reason deserves notice. "The principal reason, (says "he,) that I go upon, is, that the Plaintiff was *en ventre* "*sa mere* at the time of her brother's death, and conse- "quently a person *in rerum natura*; so that by the rules "of the Common and Civil Law she was, to all intents "and purposes, a child, as much as if born in the father's "lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living: *Beale* v. *Beale*, *(e)* and so in a variety of other cases. In *Basset* v. *Basset (f)* Lord *Hardwicke* decreed rents and profits, which had accrued at a rent-day preceding his birth, to a posthumous child; and [*140] since the Statute of 10 and 11 *W.* 3 *c.* 16, such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In *Roe* v. *Quartley (a)* the devise was to *Hester Read* for life, daughter of *Walter Read*, and to the heirs of her body; and for default of such issue, to such child as the wife of *Walter Read* is now *ensient* with, and the heirs of the body of such child, then to the right heirs of *Walter Read* and *Mary* his wife. It was contended, that the last limitation was too remote; as coming after a devise to one not in being, and his issue. But the Court said, that since the Statute of King *William*, which puts posthumous children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver* v. *Wickett (b)* the devise was to the wife for life, then to the child, with which she was supposed to be *ensient*, in fee, provided, that, if such child should die before twenty-one leaving no issue, the reversion should go to other persons named. The Court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *en ventre sa mere*, being *in futuro*, would have been a good executory devise. In *Doe* v. *Lancashire (c)* the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe* v. *Clarke (d)* Lord Chief Justice *Eyre* holds, that independent of intention an infant

(d) 2 *Atk.* 117. (e) 1 *P. Wms.* 244. (f) 3 *Atk.* 203.
(a) p. 14) 1 *Term Rep.* 634. (b) 1 *Wils.* 105.
(c) 5 *Term Rep.* 49. (d) 2 *H. Black.* 399.

en ventre sa mere by the course and order of nature is then living; and comes clearly within the description of a child living at the parent's decease, and he professes not to accede * to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happened to be actually born at the time of his death. The most recent case is that of *Long* v. *Blackall*.(a) There the Court of King's Bench had no doubt, that a devise to a child *en ventre sa mere* in the first instance was good, and a limitation over was good also, on the contingency of there being no issue male or descendant of issue male living at the death of such posthumous child. It seems then, that if estates for life had been given to the several *cestuys que vie* in this will, and after their deaths to their children, either born or *en ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time, during which the vesting of the property, which is the subject of this devise, shall be protracted, inasmuch as the circulation of real property is no more fettered in one case than in the other. It is, however, observable, that this question may never arise, if it shall so happen, that the children *in ventre matris* at the death of the testator shall not survive those, who were then born.

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[* 141]

The third ground of objection depends upon the application of the restrictive words, which are added to the enumeration of the different classes of persons, during whose lives the restriction is suspended. This objection, I conceive, will be removed by the application of the usual rules in construing wills to the present case. First, where the intention of the testator is clear, and is consistent with the rules of Law, that shall prevail. His intention evidently was to prevent alienation as long as by Law he could. If then it is to be supposed, that the restrictive words are to be confined to the last of seven different descriptions of persons, and that the testator intended to leave the four descriptions of persons, which immediately preceded this seventh class, without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head. That construction is to be adopted, which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply, when the general in- [142]

(a) *Ante*, vol. iii. 486. 7 *Term Rep.* 100

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tent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent, which is disclosed in the context: namely, that they should be applicable to such classes as require them, and as to the others to consider them as surplusage. If words admit of more constructions than one, that, which will support the legal intention of the testator is in all cases to be adopted. I do not trouble your Lordships with any observation upon the objections arising from the magnitude of the property in question, either as it now stands, or may hereafter stand, or as to the motives, which may have influenced this testator, or his neglect of those considerations, by which I or any other individual may or ought to have been moved. That would be to suppose, that such topics can in any way affect the judicial mind. For these imperfect reasons I concur with the rest of the Judges in offering this answer to your Lordships' first question.

With respect to your Lordships' second question, the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled,
[143] that an estate may be limited in the first instance to a child unborn, and, I apprehend, to the first and other sons in fee, as purchasers. The case of *Long* v. *Blackall* (a) seems to have decided, that an infant *in ventre matris* is a life in being. The established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child. If then this time has been allowed in some cases at the beginning, and in others at the termination, of the suspension, and if such children are considered by the construction of the Stat. of 10 & 11 *W.* 3 *c.* 16, as being born to such purposes, what should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for? In those cases where it has been allowed at the commencement, and particularly in *Long* v *Blackall*, (b) it must have been obvious to the Court, that it might be wanting at the termination: yet that was never made an objection. In *Gulliver* v. *Wickett* (c) the child, who was supposed to be *en ventre sa mere*, might have married and died before twenty-one, and have left his wife *ensient*. In that case a double allowance would have been required: yet that possibility was never made an objection, although it was obvious. In *Long* v. *Black-*

(a) *Ante*, vol. iii. 486. 7 *Term Rep.* 100.
(b) *Ante*, vol. iii. 486. 7 *Term Rep.* 100.
(c) 1 *Wils.* 105.

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all, (d) according to the printed report, the precise point was not gone into. But it is plain, that the attention of the Court must have been drawn to it; for the learned Judge, (e) who argued that case in support of the devise, expressly stated, that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question; for the devisee for life may die leaving his wife *ensient*, and the only difference is, that the period of gestation occurs at the beginning instead of the end of the first legal estate. It must have been palpable, that it might possibly occur at both ends. Every reason then for allowing the period of gestation in the one case seems to apply with equal force to the other, and leads the mind to this conclusion, that it ought to be allowed in both cases, or in neither case. But natural justice in several cases, having considered children *en ventre sa mere* as living at the death of the father, it should seem, that no distinction can properly be made; but that in the singular event of both periods being required they should be allowed, as there can be no tendency to a perpetuity. [144]

The Lord CHANCELLOR.—The learned Judges having given their opinion upon the points of Law, referred to them, no question remains, to which the attention of the House should be particularly called, except the point, arising out of this will, and which could not be referred to the Judges; with regard to the accumulation of the rents and profits. When this cause was decided in the Court of Chancery, it was decided by Lord *Rosslyn*, with the assistance of Lord *Alvanley*, Mr. Justice *Buller*, and Mr. Justice *Lawrence;* and it is well known, that the late Chief Justice (a) of the Court of King's Bench could hardly be brought to think any of the questions in this case fit for argument, conceiving it dangerous to give so much of serious agitation to them, as has been had; considering what had been settled with respect to executory devise and accumulation Some of your Lordships have had the advantage of hearing the opinion of Lord *Thurlow;* which cannot be doubted upon this point; after his Lordship has laid down, in *Robinson* v. *Hardcastle*, (a) what is unquestionable law, that it is competent to a testator to give a life-estate, to be appointed by the survivor of 1000 persons. That estate would be to commence at the death of the last of those 1000 persons. Upon the [145]

Testator may give a life estate to be appointed by the survivor of 1000 persons.

(d) *Ante*, vol iii 486 7 *Term Rep*. 100
(e) Mr. Justice *Chambre*, then at the Bar.
(a) p. 144. Lord *Kenyon*.
(a) p. 145. 2 *Bro. C. C.* 22. See page 30.

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questions of Law your Lordships have had the unanimous opinion of the several learned Judges. As far as judicial opinion can be collected, there is therefore the testimony of all the judicial opinion I have detailed, concurrent upon this great case; great, with reference, not to the questions arising out of it, but to that circumstance, of which, whatever attention your Lordships may think proper to give it in your legislative capacity, you cannot, exercising the function of Judges, take notice; for the question of Law, is the same upon a property of 100*l.* or a million. If it were possible, speaking judicially, to say, you entertain a wish upon the subject, your Lordships may all concur in the regret, that such a will should be maintained. But that goes no further than as a motive to see, whether it contains any thing, resting upon which, we may, as Judges, say it is an attempt to make an illegal disposition.

When this was put originally as a case, representing, that it was monstrous to tie up property for nine lives, it seemed to me a proposition, that is incapable of argument as lawyers, for the length of time must depend, not upon the number, but upon the nature, of the lives. If we are to argue upon probability, two lives may be selected, affording much more probability of accumulation and postponement of the time of vesting, than nine or ninety-nine lives. Look at the obituary of this House since the year 1796; when this will was made. Suppose, the testator had taken the lives of so many of the Peers as have died since that time: that would have been between twenty and thirty lives, and yet that number has expired in a very short period. It cannot therefore depend upon the magnitude of the property, or the number of lives: but the question always is, whether there is a rule of Law, fixing a period during which property may be unalienable. The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops.

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Property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor drops.

If the Law is so as to postponing alienation, another question arises out of this will, which is a pure question of Equity: whether a testator can direct the rents and profits to be accumulated for that period, during which he may direct, that the title shall not vest, and the property shall remain unalienable; and, that he can do so, is most clear Law. A familiar case may be put. If this testator had given the residue of his personal estate to such person as should be the eldest male descendant of *Peter Isaac Thellusson* at the death of the survivor of all the lives, mentioned in this will.

without more, that simple bequest would in effect have directed accumulation, until it should be seen, what individual would answer the description of that male descendant; and the effect of the ordinary rule of Law, as applied in Equity, would have supplied every thing, that is contained in this will, as to accumulation; for the first question would be, is the executory devise of the personal estate to the future individual so described, good? If it is, wherever a residue of personal estate is given, the interest goes with the bulk, and there is no more objection to giving that person, that, which is only forming another capital, than to giving the capital itself. [147] But the constant course of a Court of Equity is to accumulate interest from time to time without a direction, and to hand over the accumulation to that person, who is to take the capital. Take another instance of accumulation: suppose, the nine persons, named in this will, had been lunatics: without any direction, there would be an accumulation of the interest and profits of all these estates. In truth, there is no objection to accumulation upon the policy of the Law, applying to perpetuities, for the rents and profits are not to be locked up, and made no use of, for the individuals, or the public. The effect is only to invest them from time to time in land: so that the fund is, not only in a constant course of accumulation, but also in a constant course of circulation. To that application what possible objection can there be in Law?

But this is not new; for in the case upon Lady Denison's will (a) Lord Kenyon, who saw great danger in permitting argument to go too far against settled rules, held most clearly, that the testatrix had well given her property to such second son of her infant niece as should first attain the age of twenty-one, and directed accumulation through the whole of that period, following Lord Hardwicke and his predecessors: and taking the rule to be perfectly clear, that, so long as the property may be rendered unalienable, so long there may be accumulation, that in common sense it is only giving the accumulation to the person, who is to take the fund itself, if it could be foreseen, who that person would be. Therefore, as to giving the property at the expiration of nine lives and the accumulation, I never could doubt upon those points. The latter could not be a subject of dispute before the [148] late Act of Parliament, (a) which has been sometimes, though without foundation, attributed to me; and which in some respects I would have corrected, if it had not come upon me rather by surprise. That Act however

(a) Harrison v. Harrison, 21 July, 1786.

(a) p. 148. Stat. 39 & 40 Geo. 3. c. 98.

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expressly alters what it takes to have been the former Law upon the subject; admitting the right to direct accumulation; and reducing that right in given cases to the period of twenty-one years. The amount of accumulation, even through the provisions of that Act, though only to endure for twenty-one years, might in many instances, by giving the son a scanty allowance, be enormous. I do not think it was intended; but the accumulation directed by this will must, under that Act, have gone on for twenty-one years. In the construction of that Act it has been held, that it only makes void so much of the disposition as exceeds twenty-one years, leaving it good for that period. (b) Upon the old rule also accumulation for particular purposes might have gone on for nine lives, or more.

Construction, to support the intention upon the whole will, against the strict grammatical rule.

The only points that appeared to me fairly to bear argument, are, the critical discussion upon the word "as," as a relative term, and that with reference to the double period of gestation. As to the former, if your Lordships could, from dislike to such a will, refuse that construction, which will consider that word as a word of reference to each preceding description of persons, grounding that construction upon the manifest intention of the testator, upon the whole will, to make the property unalienable, as long as he could, you would gratify that inclination at the expense of overturning all the rules of construction, that have been settled, and applied for ages to support

[149] wills. If your Lordships will give any relief by legislative interference against this will, that is a very bold proposition; but not so bold as, that, because you dislike the effect of the will, you will give a judgment wrong in point of Law.

As to the other point, upon the words "born in due "time afterwards," I observe in the report, (a) the Judges *Lawrence* and *Buller* afford each a construction of these words: the one, that they mean children *en ventre sa mere*: the other held them a declaration of the testator's will, that the property shall be unalienable, and the accumulation go on during the lives of all the persons, born or unborn, whom the Law would authorize him to take as the lives for restraint of alienation, and for the purpose of accumulation. In my opinion, either of those constructions may be taken to be the intention consistently with the rules of Law: but consistently with the rules of Law your Lordships cannot reject both; but must give the words such a construction as will support the manifest intention of the testator. It is therefore beside

(b) *Griffiths* v. *Vere*, *ante*, vol. ix. 127. *Longdon* v. *Simson*, *post*, [vol. xii. p. 295.]

(a) p. 149 See *ante*, vol. iv. 314, 315, 321.

1801. THELLUSSON v. WOODFORD. In executory devise, the time of gestation may be taken both at the beginning and the end.

the point to ask, what child shall take, or, when a child shall take; for the testator is describing, not the object to take, but the lives of persons; in order to define the period, during which the power of alienation shall not exist, and the accumulation shall go on. But, if it is necessary, I have no difficulty in stating, as a lawyer, that the rule of Law has been properly laid down, that the time of gestation may be taken both at the beginning and the end; and that is what was meant in *Gulliver* v. *Wickett*; (*b*) in which case the devise was to a child *en ventre sa mere*; and to go over, if that child should die under the age of twenty-one, leaving no issue. In the construction of that limitation, expressly to a child *en ventre sa mere*, suppose that child had at the age of twenty married, and died six months afterwards, leaving his wife *enseint*: that property, absolutely given to him, would not be devested, merely because the child was not born till three months after his death. In fair reasoning therefore that is the construction of the words. [150]

Of the case of *Long* v. *Blackall*, (*a*) in which I was counsel, I can give a faithful history. It was my duty to submit to The Lord *Chancellor* the point, that the allowance was claimed at both ends of the period. His Lordship treated the point not with much respect: but I prevailed with him against his inclination to send it to the Court of King's Bench. Upon the report of the case in that Court the point did not appear to have been discussed. I therefore pressed The Lord *Chancellor* to send the case back. His answer was as rough as his nature, which was very gentle, would permit; and shows the clear opinion he had upon the point. He said distinctly, he was ashamed of having once sent it to a Court of Law; and would not send it there again. I know Lord *Kenyon's* opinion upon the subject was clear: so were those of Mr. Justice *Buller* and Mr. Justice *Lawrence*; as may be collected from the report of these causes (*b*). This case therefore comes to this, and this only. The legal and equitable doctrine is clear; and then the question is, with whatever regret we may come to the determination, is it not our duty to determine according to the rules of Law and Equity? Upon the question, whether this judgment ought to be reversed, I am bound to say, it ought not; but that it ought to be affirmed. [151]

Upon the motion of The Lord *Chancellor* the decree was affirmed.

(*b*) 1 *Wils* 105. (*a*) p. 150. *Ante*, vol. iii. 486. 7 *T. R. Rep.* 100.
(*b*) See *ante*, vol. iv. 314, 315, 321.

1801.

June 26.

BAILEY v. BAILEY.

Defendant until a fourth insufficient answer is entitled to be discharged from custody for the contempt immediately on putting in a further answer, without waiting the report upon the reference of the exceptions, though the costs have not been accepted.

THE Defendant, being in custody for contempt, upon two insufficient answers, put in a third answer; and immediately moved, that he might be discharged from custody.

Mr. Richards, in support of the Motion, cited *Wallop* v. *Brown*. (a)

Mr. Piggott, and Mr. Hart, for the Plaintiff, distinguished that case, the contempt being for want of an answer in the first instance, not after the Master's report that the answer was insufficient, (b) observed the inconvenience, if a Defendant might go on, and put in twenty insufficient answers, and insisted, that the Plaintiff must have an opportunity of referring the last answer, which was no answer to the exceptions.

The Register, being consulted by The Lord *Chancellor*, stated the practice to be, that, if the Plaintiff has accepted the costs, which this Plaintiff had not, and, generally, until the fourth answer, the Defendant is entitled to be discharged, and then he must answer in custody; also, that if the further answer is insufficient, the Plaintiff may take the Defendant again without a fresh order, unless the Plaintiff has accepted the costs, in which case there must be a fresh order, which may be obtained of course.

[152]

The Lord CHANCELLOR.—The Plaintiff must have an opportunity of referring the exceptions; but the question is, whether I must keep the Defendant in custody. I conceived the practice to be, as it is now stated, and thought, there was no difference between a first and second answer; for the meaning of the order, that he shall answer, is, that he shall answer fully.

June 28.

The Lord CHANCELLOR.—The practice is clearly settled by several authorities. *Anon.* 2 *P. Wms.* 481. 1 *Harr.* 347. *Dupont* v. *Ward* (a) *Child* v. *Brabson*. (b) *Bromfield* v. *Chichester*, (c) and this last case, *Wallop* v. *Brown*. (d) According to these cases, and the practice, the Defendant

(a) 4 *Bro. C. C.* 212, 223.

(b) In that case, when the second motion, to discharge the order for discharging the Defendant, was refused, the exceptions had been allowed. See 4 *Bro. C. C.* 223.

(a) p. 152. 1 *Dick.* 136.

(b) 2 *Ves.* 110.

(c) 1 *Dick.* 379.

(d) 4 *Bro. C. C.* 212, 223.

may do this once more; and then there will be an end of it. He must therefore be discharged. 1805.

BAILEY v. BAILEY.

Mr. Hart, *for the Plaintiff*, then obtained an order to refer the exceptions.

WATSON *v.* THE DUKE OF NORTHUMBERLAND.

[153] *June 26, 28. July 1.*

Under a Commission of partition to four Commissioners two different returns were made, each by two Commissioners. The Court would not act upon either; and another Commission issued to five Commissioners.

THE bill prayed a partition of premises in the County of *Northumberland*, in which the Plaintiff was seised in fee of eleven thirtieth parts: the Defendant, the Duke of *Northumberland*, was seised for life, with remainder in tail male to Earl *Percy*, of six thirtieth parts: and the Defendant *Forster* was seised in fee of the remaining thirteen parts. By a decree it was ordered, that a Commission should issue for that purpose. A Commission issued accordingly to four persons, directing them, any two or more of them, to walk over and survey the estates in question, and to make partition according to the best of their skill and judgment; and if they think it necessary and expedient to examine witnesses upon oath, to take the depositions in writing, and to cause them to be returned with the Commission.

To this Commission two separate returns were made; one by the two Commissioners, chosen by the Plaintiff: the other by the Commissioners, chosen by the Defendants. Each stated, that all the Commissioners had met, and walked over and surveyed the estate, and agreed in the valuation: but they made very different divisions, and there was no return of the depositions by either. Various exceptions were taken to both returns. The principal objection made by the Plaintiff was, that part of the estate, adjoining a harbour and the sea coast, was allotted wholly to *Forster*: also the exclusive property in a lime-stone quarry, without any reservation to the Plaintiff and the other Defendant of taking stones for the improvement of their allotments, paying damages: such a right being reserved by the other Commissioners. The return of the Commissioners in favour of the Defendants [154] stated a proposal by the others to determine between the different modes of division by tossing up; which was declined.

A notice of motion was given by each party to quash

1805. Wiseman v. The Duke of Northumberland.

the return in favour of the other, and several affidavits were made by the Commissioners and other persons.

Mr. Piggott, Mr. Alexander, and Mr. Bell, for the Defendants.—Under this Commission, directing four Commissioners, any three or two of them, to survey the estate, the survey must be in writing, not oral; and must contain all the particulars, ascertaining the specific and distinct value of each part. Directions are given for the examination of witnesses and other purposes, and the Commissioners are expressly directed to return the facts, and their proceedings, fairly written upon parchment, &c. They have returned no survey, no valuation, stating nothing but the quantity of the estate, viz. 570 acres, and, that they have allotted certain parts to each, for their respective shares. The difference between these returns is, that the one, though it does not return the valuation, states the result of it. The other is liable to objection, not only as not stating the valuation, but also as an excess of power. Allotting a valuable lime-stone rock to one, a rent might be given to the others for owelty of partition: but that is all the Commissioners or the Sheriff could do. The remedies for that are easy and ascertained, not subject to the objection, arising from leaving it open to each of the parties for the purpose of improving upon his own allotment. The object of the Commission is, entirely to take away rights that lead to such uncertainty. [135] The principle is against the adoption of a partial return, where the Commissioners on each side do the best they can for their respective friends, and the chance is to be taken in this Court with the imperfect means it has of determining in such a case.

Mr. Richards, Mr. Romilly, and Mr. Thomson, for the Plaintiff.—It is not known, in what way, or at what time, this Court first assumed this jurisdiction. It was probably, as in the case of dower, first introduced by the circumstance, that there was some outstanding estate; which would prevent the legal remedy, and till lately every bill had such a charge: but since the case of *Curtis* v. *Curtis* (a) that has not been considered necessary: being merely a formal suggestion, though probably founded originally in fact.

If there was a return by two of the Commissioners, and no return by the others, that would be sufficient. In *Corbet v. Davenant*, (b) the returns were quashed; and a new Commission was awarded, to prevent the double return appearing on the record. That was not the case of mutual complaints of two returns: but one party, a Defendant, complains of both returns. There is no case

(a) 2 Bro. C. C. 620 (b) 2 Bro. C. C. 252.

1805.

WATSON
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previous to that. In *Randle* v. *Adams*, a late case at the Rolls, two returns were made, and upon the application of the Plaintiff one of those returns was suppressed; and the other established: the former being considered, as though nominally a return, no return ... ; and therefore to be suppressed, as if never annexed to the Commission; and then, two Commissioners having a right to act, the Court might proceed and examine the other return; and *The Master of the Rolls*, thinking there was no objection to that, acted upon it. [156] If that cannot be done, it is in the power of two Commissioners by refusing to concur, to prevent the other two, who have power to make a return, from obeying the Commission. If the refusal of two to make a return will not prevent the Court's acting upon a return by the others, the effect of a return, which the Court sees ground to suppress, as no return, can be no more. In many cases there may be no difficulty; as, if the Plaintiff and Defendant were seised in severalty of two estates, divided by a tract of land, of which they were tenants in common, and two of the Commissioners made a proper division of that; the other two giving to the Plaintiff the land contiguous to the Defendant's estate, and to the Defendant that contiguous to the Plaintiff's; except upon form, the Court could have no difficulty in rejecting the one, and adopting the other. There was great difficulty upon that case. They even made it a close Commission, swearing them to secrecy. As in that instance, the Court will look into the circumstances attending the two returns, and establish one; quashing the other. An ocular survey is sufficient in the common acceptation, and it was not necessary, that the consequences of the survey should be put in writing, that every acre should be particularly described, and the value of each allotment stated, when it is stated, that they have allotted them equal in value. There is no resemblance between this proceeding and the report of a Master, who is to ascertain the facts, and form his judgment upon them, and the statement of facts and his judgment are both subject to the review of the Court. The Master's judgment is in truth the judgment of the Court. But a Commission of Partition comes in the place of the Writ of Partition at Law. The only distinction is, that the Commissioners stand in the place both of the Sheriff and the Jury. The Jury are to have a view: the most important part of their duty: and upon their own view 157] they may make their return; for it is not essentially necessary that witnesses should be examined. The Commission directs these persons, any three or two of them, to go over and survey the premises, and to make partition according to the best of their skill and judgment,

1805. WATSON v. The Duke of NORTHUMBERLAND.

not, according to the facts ascertained by the evidence of surveyors, &c.; and then they are authorized, if they think it necessary and expedient, to examine witnesses. That is not made imperative upon them; but they are to judge of the necessity. The Commissioners may be persons of such skill, that it might not be necessary to incur the expense of employing surveyors.

The Court must act imperfectly, not having the skill, knowledge, and judgment, with which the Commissioners are to act, upon the testimony of their own senses, as well as upon the facts, deposed to them. This is the general understanding. Upon very few Commissions has any return been made of the evidence: yet the objection was never before made. In the last case, *Turner* v. *Morgan*,(a) no evidence was returned; and no objection was made upon that ground.

[158] The charge of excess of power by these Commissioners consists merely in giving liberty to each party to work and use the lime-stone for the use and improvement of the respective buildings, lands, and allotments, in the same township, and for no other purpose. The land, in which the lime-stone was situated, being given to one, it was fair to give that liberty to each of the others, paying him a rent for the use of it. An actual division of such property was impossible, and as they had previously been tenants in common of it, no other course could be taken without injustice. This lime-stone is the source of all the value of the premises. An equal division is not necessary to a partition; as in many instances, a manor, an advowson, &c. the subject does not admit of it.

June 28. *The Lord* CHANCELLOR.—I thought it had been perfectly settled, that, if a patent writ of Commission of this sort had gone to four persons in these terms, and the four Commissioners had divided themselves in this way, in contemplation of the Law, and of this Court, there is no return whatsoever, not being aware of the case lately decided at the Rolls. First, if this was the Common Law writ, there would be no denying, that, where four persons

(a) *Ante*, vol viii 145. The end of that case was, that, the Commission having been executed, an exception was taken by the Defendant; on the ground, that the Commissioners had allotted to the Plaintiff the whole stack of chimneys, &c all the fire-places, the only stair-case in the house, and all the conveniences in the yard

Upon the 1st of *August*, 1804, the exception was overruled The Lord *Chancellor* said, he did not know how to make a better partition for the parties, that he granted the Commission with great reluctance, but was bound by authority, and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell

1807. Watson v. The Duke of Northumberland.

are authorized to do a thing, with power for three or two of them to act, the meaning is, that, if all four act, three may make the return; and if three act, two may make the return. (1) The Commission, under which the Judges of the Court of King's Bench act, illustrates this. If a difference of opinion takes place among them, if three are in Court, and two concur in opinion against the third, that is sufficient: but if all four are in Court, and two are of one opinion, and the other two of a different opinion, the Commission does not authorize two out of four to act, therefore in Law it is the judgment of none of them. Also, if this writ patent is to be construed, as all Common Law authorities are, there is no pretence to say, that an authority could be executed by two out of four persons, the other two executing it in a manner directly contrary: but if four act, three must concur, and if three act, two must concur. 159

In the case of *Curzon* v. *Lyster*, I was in a situation that called upon me to consider it very much, and I am confident upon my own recollection, that two points arose in that case, which extremely alarmed both parties: one, that the Commissioners had divided the property in such a way as to throw the burgage interest very much into one hand; and there was a serious apprehension, that this Court could look at that property only as mere land; and could not take into consideration the advantage, understood to be attached to it. On the other hand they were advised, that, the Commissioners having divided, the Court could do nothing. Those considerations induced the parties to agree. Also in *Corbet* v. *Davenant*, (a) I recollect, the objection came from the Court: for Lord *Thurlow* himself interposed, and said, he could do nothing; for the Court had not that assistance it ought to have from a due execution of the Commission of partition.

So it rested till the case at the Rolls, and I cannot help thinking, notwithstanding that case, there is great weight in the objection, if the legal construction of the instrument be upon all antecedent authority such as I have suggested. The objection is also founded strongly in policy as well as in Law: and this case shows that. I have no difficulty in saying, if the facts, stated in one of these returns, as to the conduct of all the Commissioners, cannot be contradicted, I should feel myself called upon 160
to suppress both returns, for all four Commissioners misunderstood their duty. Commissioners, when once they are appointed, though appointed by the different

(a) 3 Bro. C. C. 252

(1) See the *Case of the Baltimore Turnpike Road*, 5 Binn. 481

1805.

WATSON v. The Duke of NORTHUMBERLAND.

Commissioners not to consider themselves agents for the parties, by whom they are nominated.

parties, are Commissioners for all the parties. These Commissioners have totally mistaken the situation, in which they stand, their duty, and the confidence, placed in them by the Court, if they call themselves the Defendant's or the Plaintiff's Commissioners. When once they are nominated, they owe an impartial duty to the Court and all the parties (1)

These Commissioners caused a survey to be made: (that is the expression) Each took a copy, and so separate and apart two see, how they can make the best division for the Plaintiff, and two, for the Defendant. They do not meet together, as they ought, and expose the mind of each to all, and see, how they can divide it together: but, making their division separately, they meet, and each two produce their division, and of necessity the proposed divisions are perfectly different: each abide by their own decision, then a proposal to toss up was made: an objection was made to that, at length they make these separate returns It is clear, this is not a due execution of the authority upon either side. It is an execution of their authority, made under a conviction, that the Commissioners were to struggle for the interests of those, who appointed them. All that is to be expected, if Commissioners are to divide in this manner, is, that, instead of parties being satisfied, that their duty requires them to name men of impartiality as well as of skill, the consequence will be, that you never will have any person named, who will act in any other way, than each for the person who named him But if there must be a majority, parties would feel it their interest to name persons of [161] impartiality, and Commissioners would find, they could not baffle the object of this Court If it was entire, the wholesomest thing for the general administration of justice would be, to put the strict legal construction upon the authority given by the writ, and, notwithstanding that case, my present opinion is, that this is not a due execution of that authority.

The suppression of one of these returns would not remove the difficulty, for, all four acting, and being willing to make a return, no two could make a return. Therefore quashing one will not set up the other. Upon that ground therefore it must go back I should lament it the more, if I saw any hope, that I could do any thing but send this back upon the merits. But there are objections to both certificates, of such a nature, that I ought not to trust myself with the decision, upon such materials as can be laid before me, that either is right. I believe the practice is, as it has been stated, that in general the re-

(1) See 1 Peters' Rep 88, *per* Washington, J

1805. WATSON v. The Duke of NORTHUMBERLAND.

turn is made without the evidence; but then how is it possible for the Court to act, where four Commissioners, all skilful men, in whom the Court places confidence, make different returns, two on one side, and two on the other.

From the certificates it appears, they have all agreed as to the value of the land. But in one site it may be of very different value from the value of it in another site; for instance, the land containing the lime-stone. Giving that to one with the benefit of this reservation to the others may be very proper, or it may not. If there is resort to it for manure, in that country it is an object of value, not merely as land, but as a commercial object; and that consideration is to be attended to also. But it may be fair to give the whole to one, provided it is made up to the others, with due regard to that consideration. So, as to the appointments to *Watson* and *Forster*, with reference to their private property, there may be no reason for disturbing the partition. The principle as to that is, that, if the thing divided is given with due regard to the value of that thing among the parties, it is no objection, that it is given so as not to increase the value of other property, not the subject of the partition. In many cases a man might say, another should not have two-thirds of a field contiguous to his mansion-house, without paying a price on account of its value to him with reference to that situation. [162]

I have not at present any means before me of deciding, whether this partition, which does not, as it could not possibly, allot, in the proportion 6, 11, and 13, bear to 30, the different parts of the estate, upon which partition ought to be made, has been made with due regard to site and convenience, and the different local advantages the property would carry along with it. It is not possible for me with the materials before me to form a satisfactory judgment upon such considerations; and therefore I cannot help thinking, if the Law allows me to say, this is not a due return, I ought not to struggle to execute a duty I cannot execute.

My present opinion therefore is, that, notwithstanding the case at the Rolls, two Commissioners making one return, and two others making one directly contrary to that, there is no validity in either.

July 1.

The Lord CHANCELLOR.—I remain of the same opinion; that, where two Commissioners return one, and two the contrary, way, nothing can be done upon either return. I have great anxiety to gratify the inclination to give

1805. Watson v. The Duke of Northumberland. [* 163]

some direction to the Commissioners, in what manner they are to execute their * duty: but in all the uncertainty, that prevails upon this subject, I do not find the means of informing myself what direction to give. It must be either by sending it to the Master to state the practice, which will be expensive; or by employing some person to look in the Register's office, with a view to see, what the Court has done with such cases of Commissions. Without such information I cannot say, what is the precise, accurate, and official, mode of directing them to execute their duty.

Mr. Cooke, (amicus curiæ,) said, in a case in the Court of *Exchequer* the Court itself named Commissioners to set out land in lieu of tithes. There had been two Commissions, and the Commissioners named by the parties could not agree.

The Lord CHANCELLOR.—I understand, the Court of *Exchequer* have been of the same opinion, that where two Commissioners return one way, and two another, nothing can be done.

Another Commission issued, directed to five Commissioners.

July 4.

Ex parte SUTTON.

An Attorney's bill of costs, though it has not been signed and delivered under the Stat. 2 Geo. 2. c. 23. s. 22 is a good legal debt, upon which a Commission of Bankruptcy may issue.

AN objection was taken upon a petition in Bankruptcy, that the debt upon which the Commission was taken out, was a bill of costs due to the petitioning creditor, * as an Attorney; which had not been signed and delivered by him under the Act of Parliament. (a)

Mr. Richards, and Mr. Owen, in support of the Petition, admitting, that a Commission cannot be taken out upon an equitable debt, contended, that this was not an equitable, but a legal, debt, though an action could not be maintained upon it, until the directions of the Statute had been complied with.

[* 164] *Mr. Romilly, and Mr. Cooke, contrà,* insisted, that the

(a) Stat. 2. Geo. 2. c. 23. s. 22.

debt of the petitioning creditor must be, not only a legal debt in its nature, but a debt upon which an action might be brought; and an Attorney might thus cause the ruin of a trader, by taking out a Commission upon a bill, which afterwards may be cut down by taxation.

1805. *Ex parte* Sutton.

The Lord CHANCELLOR.—My opinion is, that an Attorney may take out a Commission of Bankruptcy without delivering his bill. It is true, a Commission cannot be taken out upon an equitable debt: but the question is not, whether the debt to support a Commission is one, upon which an action cannot be brought, by virtue of any imposition of the Legislature, but upon the nature of the debt, being an equitable, and not a legal, debt. There is no doubt, an Attorney's bill is a legal debt, and he has all the remedies, that are not taken away by Act of Parliament: but the Law has restrained him from bringing any action, until his bill has been delivered a month; but leaves him, where he was previously to that Act, as to Commissions of Bankruptcy. There may be hardship in permitting him to take out a Commission upon a demand, which may be reduced by taxation. In many cases there is great hardship upon him. But it is enough to say, the language of the Act has not restrained this remedy, which is therefore open to him; and my opinion therefore is, that it is not necessary to deliver his bill.

A Commission of Bankruptcy cannot be taken out upon an equitable debt.

[165]

PALMER *v.* NEAVE.

Rolls. *July* 2.

BY the marriage settlement of *John Payne* and *Mary Manoux*, dated the 29th of *May*, 1792, in consideration of the marriage and of the sum of 2000*l.* the portion paid to *Mr. Payne*, his father Sir *Gillies Payne* granted to *Miss Manoux*, after the decease of her intended husband, an Annuity of 400*l.* charged upon estates in the *West Indies*; to be paid in full for her jointure, and in lieu of dower.

Settlement of a jointure by a father upon the marriage of his son. Bond of indemnity, of the same date by the son to the father, void, as a fraud upon the contract.

By a bond, of the same date, *Mr. Payne* became bound to his father in the penal sum of 3000*l.*: with condition, reciting the intended marriage, and, that *John Payne*, not having it in his power to settle a jointure upon his intended wife, Sir *Gillies Payne* at his instance and request, upon the treaty for the marriage, agreed to grant and secure to *Mary Manoux* during her life, in case she should survive her intended husband, a yearly rent-charge of 400*l.* out of Sir *Gillies Payne*'s estates in the *West In-*

1805. Palmer v. Ne . . . ties and reciting the execution of the settlement accordingly: and that in order to induce Sir *Gillies Payne* to grant the rent-charge, *John Payne* proposed and agreed to enter into a bond, for the purpose of indemnifying Sir *Gillies Payne*, his heirs, and assigns, and his said estates,
[166] against the payment of the said rent-charge, &c.; and declaring, that if *John Payne* should pay the Annuity, and keep Sir *Gillies Payne*, his heirs, &c. indemnified, or if *Mary Manoux* should die in the life of her husband, the obligation should be void.

John Payne, afterwards Sir *John Payne*, died in 1803, leaving his wife surviving. The bill was filed by his executors against the executors of his father, charging, that the bond was a fraud upon the settlement, and the parties, that it was privately settled and agreed upon between the husband and his father, and that neither the wife nor her father were informed, that any such bond was to be entered into, or, that the estate of Sir *Gillies Payne* was in any manner to be indemnified against the payment of the Annuity, and that Sir *Gillies Payne* made use of his influence as father, to induce his son to give the bond. The bill prayed accordingly, that the bond may be declared a fraud upon the marriage settlement; and may be declared void, and be delivered up.

The Defendants, in answer to the charges of the bill, stated, that they did not know whether the bond was entered into with the knowledge of the parties to the settlement, or privately. No evidence was produced on either side.

Mr. Romilly, for the Plaintiffs, contended, that the bond of the same date as the articles, and the object to undo what was done by the settlement, was a fraud upon the settlement, according to *Turton* v. *Benson*, (a) *Nevile* v. *Wilkinson*, (b) and many prior cases.

[167] *Mr. Piggott, and Mr. Wingfield, for the Defendants*, insisted, that the circumstances of this case did not show any fraud upon the marriage contract, as in all the cases referred to, in which by a distinct transaction part of the money was to be returned: this was only a natural family transaction, perfectly free from fraud.

Mr. Romilly, in Reply, was stopped by the Court.

The Master of the Rolls.—There is no distinction in principle between this and the other cases. This is as much a fraud upon the faith of the marriage contract. In

(a) 1 *P. Wms.* 496.

(b) 1 *Bro. C. C.* 543. *Scott* v. *Scott*, cited *ante*, vol. iii. 458. The principle, that a private variation of the terms of a contract by some of the parties, prejudicial to others, is void, prevails in a variety of cases. See *Eastabrook* v. *Scott*, *ante*, vol. iii. 456.

what does the fraud consist? In affecting to put the party contracting for marriage, in one situation by the articles, putting that party in another, and a worse situation, by a private agreement. The parent in this case professes himself to settle the jointure. The son therefore according to that was to have no part of the burthen thrown upon his property: but by the private agreement the burthen is thrown altogether back upon the son. It is of no consequence, that the lady is equally, or more, secure; for the contract proceeds upon this; that he has found the means of providing for her without resorting to his own fortune. Whereas the effect of the private agreement is to throw the burthen entirely upon his fortune, by which he is to that extent prevented from providing for his family, as he otherwise might. This is just as much a fraud upon the marriage contract, as if, receiving a fortune, he returns part of it. His capacity of providing for his family is equally diminished in both cases. There is therefore no distinction upon which this case can be taken out of the effect of the principle.

1805. PALMER v. NEAVE.

KNOWLES v. HAUGHTON.

[168]

ROLLS. July 7.

The profits of a partnership in underwriting, illegal by the Statute 6 Geo. 1. c. 18. s. 12, cannot be the subject of account in Equity. (1)

THE object of the bill was to establish a partnership between the Plaintiff and the Defendant in the business of brokers and underwriters; praying an account, and payment of a moiety of the profits. The Plaintiff went into evidence to prove the partnership; which was denied by the answer; the Defendant stating, that the Plaintiff was merely employed as a clerk; though the Defendant allowed him half the profits of the underwriting business; and that the insurance business was conducted in the sole name of the Defendant; and insisting, that the partnership, as underwriters, could not legally subsist; and, in case a loss should be incurred in that business, the Defendant could not charge the Plaintiff with, or compel payment of, a moiety of the loss: admitting, that it was understood between them, that the Plaintiff should be answerable for a moiety of the losses, if any, upon that account.

Mr. Richards, and *Mr. Leach*, for the *Plaintiff*, cited the case of *Watts* v. *Brooks*; (a) insisting, that the object

(a) *Ante*, vol. iii. 612.

{(1) See the note to *Watts* v. *Brooks*, *ante*, vol. iii. p. 612.}

1805. Knowles v. Haughton.

of the Statute (b) was only to avoid the contract as against the assured; and, that the Statute was satisfied by the appearance of only one name; against whom alone the action could be brought.

Mr. Romilly, and Mr. Hart, for the Defendant, denied the law of that case, upon the authority of *Sullivan* v. *Greaves*, (c) and *Mitchell* v *Cockburn*, (d) insisting, there can be no distinction upon the Statute (e) between Law and Equity.

[169] *The Master of the Rolls* expressed his approbation of the late cases, observing, that he had always found it difficult to reconcile the distinction in *Waite* v. *Brooks* (a) to his mind. As to the circumstance, that the name of the Defendant alone appeared, if the other insurers could compel a contribution, the assured had the security of their capital, and any other construction would do away the effect of the Statute in favour of the companies.

The decree dismissed so much of the bill as sought an account of the profits of the underwriting business, and directed an account of the other business upon the footing of the partnership. (b)

(b) Stat 6 Geo 1 c 18 s 12. (c) Parke's Insur. 8.
(d) 2 H Black 349. Parke's Insur 8.
(e) Stat. 6 Geo 1 c 18 s 12.
(a) p 169 Ante, vol iii 612. (b) Ex relatione.

July 11.

ANONYMOUS

After a decree, merely directing inquiries, such an order as could be had on further directions may by consent be made on motion; as, in this instance, to dismiss the bill with costs.

MR. LEACH, for the Plaintiff, after a decree, directing inquiries, moved upon terms, that the bill should be dismissed with costs.

Mr. Cooke, for the Defendant, had no objection, if such an order could be made after a decree, except by decree on further directions.

The Lord CHANCELLOR.—If the decree merely directs inquiries, to enable the Court to determine for the first time what is to be done, the parties may consent now to have such an order as could be made upon further directions. Therefore, upon the consent, let the bill be dismissed with costs.

1805.

ANONYMOUS.

July 13.

Order upon the Sheriff to pay to the party money under an attachment for not paying costs.

A MOTION was made, that the Sheriff of the County of *Kent* may be ordered to pay to the party money, under an attachment for not paying costs, with the costs of the application. Notice of the motion was served personally on the Sheriff, and also on the Clerk in Court: but they did not appear.

Mr. Bell, in support of the Motion, cited from the Register's book (a) a case, in which the Sheriff, having permitted a man, taken upon an attachment, to go at large, was, upon motion, ordered to pay the money into Court.

The Lord CHANCELLOR observed, that it was a strong measure; but upon the authority produced, and, as they did not appear, made the order.

(a) *Mich.* 1784. *Reg. Lib. B.* 1783. *Fo.* 10.

LUFKIN *v.* NUNN. (1)

July 13, 18.

Demise by a copyholder for one year, and at the end of that term, from year to year for the term of 13 years more, in all 14 years, if the Lord will give license; and so as there shall be no forfeiture with the usual covenants in a farm lease.

The license is a condition precedent; and, not being granted, there is no lease at Law further than from year to year: and there is no Equity upon the circumstance, that the Lord purchased his tenant's interest, with notice of the demise, and an express exception of all subsisting leases, or agreements for leases.

BY indentures, dated the 28th of *February*, 1795, *Elizabeth Hotchkin*, tenant for life of a copyhold farm, held of the Manor of *Great Bromley* in the County of *Essex*, demised the farm to *John Lufkin*, his executors, *&c., to hold from *Michaelmas*, 1794, "for and during the full "end and term of one whole year from thence next en-"suing and fully to be complete and ended, and at the "end of the said term of one year from year to year for "and during the term of 13 years more in all 14 years if "the Lord or Lords Lady or Ladies of the said manor or "manors of whom the said demised premises are holden "will give license or consent and so as the same or any "part thereof shall not become forfeited or liable to be "forfeited yielding and paying therefore yearly or every "year during the said term unto the said *Elizabeth Hotch-"kin* and her assigns for so long a time as she the said "*Elizabeth Hotchkin* shall live and from and immediately "after her decease unto such person or persons to whom

(1) See *Sugden, Vend. & Purch.* 528, 2 *Am. Ed.*

1805. LUFKIN v. NUNN.

"the next immediate remainder or reversion of the same "premises shall for the time being belong the yearly rent "or sum of 42*l.*:" payable half-yearly, at *Lady-day* and *Michaelmas*.

The lease contained a proviso for re-entry for non-payment of rent; or if the tenant should assign, &c. without license, or commit waste, &c.; and a covenant by *Lufkin* "during the said term" for payment of rent, and repairs, and the usual covenants for occupation in a farm lease, among other particulars "in the last year of this "demise" to leave ten or twelve acres of fallow, and to permit the succeeding tenant to enter and sow the fallows in *July*, &c.. and to permit *Elizabeth Hotchkin*, or her assigns, &c. to enter and sow "in the last year of this "demise," and *Elizabeth Hotchkin* covenanted for certain repairs, to allow for the fallows out of the last half-year's rent, and the use of a barn and piece of ground "till *Lady-day* next after the expiration of this demise" and that he the said *John Lufkin*, his executors &c. paying the rent and performing the covenants, "shall and

[172] "may peaceably and quietly have, hold, occupy, possess, "and enjoy, all and singular the above-mentioned to be "demised premises with the appurtenances for and during "the term aforesaid without the let, suit, trouble, denial, "or disturbance of the said *Elizabeth Hotchkin* or her "assigns or of the person or persons to whom the next "immediate remainder or reversion of the same premises "shall for the time being belong, or of any other person "or persons by her or their means, consent, or procure-"ment."

Lufkin also covenanted, in case *Elizabeth Hotchkin* or Colonel *Buckeridge*, then the next immediate person in remainder or reversion, should be desirous to possess all or any part of the premises demised for her or his own actual occupation, or for the purpose of building, upon twelve months' notice to surrender all or any such part; receiving a compensation according to Arbitration.

No license was obtained from the Lord of the Manor. The lessee entered immediately after execution of the lease, and continued in possession until his death in *August*, 1801, and after his death his executors took possession. On the 18th of *September*, 1801, *John Hanson*, then, and at the execution of the lease, Lord of the Manor of *Great Browley*, contracted with *Mrs. Hotchkin* and Colonel *Buckeridge* for the purchase of this copyhold farm with other premises, and accordingly in *February*, 1802, the premises, comprised in the farm, were surrendered to *Thomas Nunn*, as a trustee for *Hanson*. At the time of the purchase a written contract was made, containing an exception of all subsisting leases, (if any there

were ;) and before payment of the purchase-money and the surrender of the premises an abstract of the title was delivered to *Hanson*'s agent ; in which the terms of the lease to *Lufkin* were correctly stated . and in a deed from *Mrs. Hotchkin* and Colonel *Burlidge* to *Nunn*, dated the 17th of *March*, 1802, there is a covenant against encumbrances, with an exception of rents and services to the lord : " and also of the several and respective subsisting lease or leases or agreements for leases under which " the present tenants now hold the same premises or any " of them." 1803. LUFKIN v. NUNN. [173]

On the 19th of *March*, 1802, *Hanson* served *Nunn* with a notice in writing, that he, *Hanson*, would not grant any license, or consent, to or for him, or any other person holding within the manor by copy of Court-roll, to demise or let to any person as under-tenant for any term of years ; and would not give license or consent to the duration of any under-tenancy longer than at will, or from year to year only. On the same day *Nunn* served the executors of *Lufkin* with a notice to quit , and afterwards brought an ejectment , upon which the bill was filed against *Nunn* and *Hanson*, praying, that the Plaintiff may be decreed to hold and enjoy for the remainder of the term , and an injunction against proceeding in the ejectment No motion being made for an injunction, the ejectment proceeded . and a verdict was found for the Plaintiff, subject to the opinion of the Court upon a case , upon the argument of which case in the Court of King's Bench judgment was given for the lessor of the Plaintiff.(a) A motion was then made for an injunction , and on the 28th of *November*, 1803, a case was ordered for the opinion of the Court of Common Pleas upon the following questions :

1st, Whether any ejectment will lie for the above messuage or tenements, and farm, before the expiration of fourteen years from the commencement of the lease :

2dly, Whether, if an ejectment will lie within that time, and the tenant in possession should be ousted thereby any action can be maintained on the covenant for quiet enjoyment. [174]

The Court of Common Pleas returned the following certificate :

" Having heard Counsel upon this case, we are of " opinion, 1st, that an ejectment will lie for the above " mentioned messuage or tenement, and farm, before the " expiration of fourteen years from the commencement " of the lease :

(a) Doe on the Demise of *Nunn* v. *Lufkin*, 4 *East* [illegible]

1805. LUBKIN v. NUNN.

"2dly, That if the tenant in possession should be evicted "by such ejectment, no action can be maintained on the "covenant for quiet enjoyment.

J. MANSFIELD.
J. HEATH.
G. ROOKE.
A. CHAMBRE." (a)

The cause came on upon the Equity reserved.

Mr. Romilly, for the Plaintiff—The Court of Common Pleas having decided very clearly against the Plaintiff, the only question is, whether he has any Equity. Such covenants as these are never contained in a lease for a year. It must be admitted, this is not a lease at Law: nor a forfeiture of the estate. But the question is, whether in Equity the person, who executed this instrument, [475] purporting to be a lease, can be permitted to say, it is void; and, that the Plaintiff should not have the benefit of the covenant, entered into for quiet enjoyment for fourteen years. It was the duty of the lessor to obtain the license; who therefore cannot in Equity raise the objection for want of it. Clearly this license could be obtained by the lessor only; for it is not a license to take a lease, but a license by the lord to his tenant to demise; and there is no privity between him and any other person. It appears, the license can be obtained; for by the act of the lessor, selling to the lord, the two characters of the person, who is to grant the license, and the person, to whom it is to be granted, are united. Suppose the fact reversed; that, instead of the purchase by the lord from the tenant, the tenant had purchased the manor. She could not have withheld the license she had contracted to procure. Suppose the tenant of an ecclesiastical lease, ordinarily renewed, though under no obligation, grants an under-lease: with a covenant to obtain a renewal, if he can, and in that event to renew to the under-tenant; and afterwards under the Act for redemption of the land-tax the original tenant purchases the estate: he could not insist upon the right the Bishop, or other ecclesiastical person, would have to refuse to renew according to his contract with the under-tenant. The reason is, that by his purchase he has altered the nature of his contract with the under-tenant, the effect of which is a tacit undertaking not to give an interest to the person, to whom the application for the lease is to be made, to refuse it. So in this case, the lord purchasing the copyhold tenement, or the tenant purchasing the manor, the nature of the contract is quite altered. The lord, if he had not

(a) 1 *Bos. & Pul. New Rep.* 163.

an interest, inducing him to grant the license, at least had no interest to withhold it, and it was contrary to Equity, that his lessee, having entered into this contract, should give * him an interest to refuse it. Suppose a devise to *A.*, provided he marries with the consent of *B.*, and, if he should not so marry in a certain time, to *C.* If *B* a mere trustee, to exercise that discretion for no pecuniary motive, or motive of interest whatsoever to himself, should purchase the contingent interest of *C.* this Court would hold, that by what he had done he had made it impossible to withhold his consent, having put himself in a situation, in which he had an interest to withhold it So, the Lord, having originally no interest to withhold his license, has by this purchase acquired a pecuniary interest in withholding it, which he cannot do The ground, stated by the Lord Chief Justice of the Common Pleas against the Plaintiff, is, this is a lease, or it is nothing But there are many cases, in which Equity will give effect to an instrument, defective at Law, and upon the same principle this in Equity will be considered as a lease: the intention being, that the lessee should enjoy for fourteen years, and under the circumstances no advantage can be taken of the Lord's withholding his license.

1805

LEEDS v. NEVA [*176]

Mr. Hollist, Mr. Grimwood, and Mr. Bosanquet, for the Defendant—Under the circumstances of this case, there is no Equity. The tenant contracting with this Plaintiff, was the person to obtain the license, and even that license, after the expiration of the year, could not make it good. *Mrs. Hotchkin*, omitting to obtain the license within the time, could not insist, that the person, with whom she contracted, was bound. It is inaccurate to say, the lease was void: it is determined It was a good lease for one year; with a chance, that it might be enlarged to a lease for fourteen years. The Lord was not bound to grant his license: nor was it for his interest to be bound up at that rent and fine for fourteen years If the case had been reversed, and the copyhold tenant had purchased the manor, that would not have made a difference, the lease would have been gone, and the Plaintiff would have been tenant at will merely. The case put of a Church lease, supposes an actual contract to renew, if the original lease should be renewed. The "term aforesaid," in the covenant for quiet enjoyment, means the term of one year, with the further conditional term: which is gone, the license not being granted. If the effect of this covenant is to keep the tenant in possession, against the will of the Lord, the tenant will obtain that which could not be done directly; and the attempt to do which would produce a forfeiture.

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The grant of the license is a condition precedent. If the conditional interest did not vest at the end of one

1805. LOFKIN v. NEVE

year, at what period is it to take place? Can it be set up at any time during the period of thirteen years? The purchase by the Lord was long after the expiration of the year

Mr. Romilly, in Reply.—The construction, that this was to be a lease for one year in all events, or for fourteen years in all events, cannot be maintained It is a lease for one year: with a covenant to make a similar lease every year, until the Lord shall grant his consent for the rest of the period of fourteen years The event therefore was not, as is supposed, to be determined at the end of the first year: and from these covenants it is clear, that could not be the intention: for instance, the covenant, that upon twelve months' notice the lessee shall give up part of the premises for the purpose of building: an absolute, not a conditional, covenant The same rent could not be reserved upon a lease for fourteen years and upon a precarious tenure, providing for two such different events. The construction of the Court of Common Pleas is difficult There is no doubt of the intention that the tenant should hold for fourteen years The principle of the case upon the Church lease, that the original lessee had virtually undertaken not to give his lessor an interest to refuse his consent, which interest he had not before, applies precisely: the Lord by this purchase acquiring such an interest which he had not before So, in the case of marriage with consent. If the Lord said, he would give his consent, if *Mrs. Hutchkin* would apply: would not this Court compel her to make the application? [178]

The Lord CHANCELLOR —I think there is not Equity enough to sustain this bill.

(*a*) *The Lord* CHANCELLOR (1) said, he had seen the report of the case in the Court of Common Pleas; from which it appeared, that the topics, for which the case was sent to that Court, were not touched upon: but his Lordship added, that he had conversed with the Judges, and their opinion was the same as if those topics had been gone into, that it was an absolute contract between landlord and tenant, that, being a lease, it cannot be looked upon otherwise than as a lease, and under that the tenant having no right, the consequence is, the bill must be dismissed.

The bill was dismissed.

(*a*) *Ex relatione*

(1) After taking a day to consider the case. *Sugden, Vend. & Purch.* 528. (2 *Am. Ed*

1805.

Rolls
July 16

HANCOX *v.* ABBEY

Devise, in trust, to sell and pay off a mortgage, and to raise another sum, which the testator gave to his daughters: the personal estate, though bequeathed after payment of debts and legacies, exempted from the payment of those two sums, without express words, upon the plain intention (1)

WILLIAM HANCOX by his will gave and devised to his wife, and to *Henry Sexton*, all his manors, messuages, lands, &c. as well freehold as copyhold, in the Counties of *Middlesex* and *Buckingham* or elsewhere in *England*; upon trust as soon as conveniently might be after his decease to sell and dispose of so much and such part only of his said manors, &c. except the copyhold premises at *Slough*, in his own occupation, as would be sufficient for the purposes after-mentioned and to apply the money in manner following; that is to say, that they shall and do thereout in the first place pay off and discharge the sum of 3000*l.* due on mortgage of his freehold estate at *Hanwell*, and interest; and in the next place raise the sum of 2000*l.*; which he gave and bequeathed to his two daughters *Mary* and *Elizabeth Hancox*, equally, to be paid at their respective ages of twenty-one or marriage with directions, that as soon as the said sum of 2000*l.* shall be raised, it shall be invested in stock, and the dividends applied for maintenance, and for survivorship, and upon further trust, that his wife should, after such sale or sales and application of the purchase money for the purposes aforesaid, take the rents and profits of the residue of his said estates, as should be left unsold, for her separate use; and after her decease he devised all the residue of his said estates, as should be left unsold, as aforesaid, to his two daughters, and their respective heirs and assigns, as tenants in common, with a direction, that his wife and children shall, during their respective lives, live in the copyhold estate at *Slough*, and that they or any of their descendants shall not sell that estate, out of respect to his own memory and his father's, and that it shall continue in the possession of some of the branches of his family, as long as any shall exist, and from and after the [180] decease of his wife, he gave and bequeathed to *William Dean*, in case he should be then living, the yearly sum of 20*l.* payable quarterly, for his life, and to be charged and chargeable on such of his said freehold and copyhold estates as he had given and devised to his daughters after the decease of his wife, which Annuity he revoked by a codicil: giving *Dean* in lieu of it the sum of 400*l.* to be paid within six months from the time he should quit the service of his wife: and he gave and bequeathed, to all his other servants as should be living with him at his

(1) See 4 Desaus. Cha. Rep. 323, and the note to *Aighley* v. *Kiehley*, ante, vol ii p.

1805. HANCOX v. ABBEY

decease, the sum of 5*l.* each, to buy mourning. He then proceeded thus:

"And as to, for, and concerning all the rest and residue of my goods, chattels, ready money, debts, and securities for money, household goods, stocks, and all other my personal estate whatsoever, and wheresoever, and of what nature, kind, or quality, soever the same may be, and which I shall be any ways possessed of, interested in, or entitled to, at the time of my decease, and not otherwise by this my will given and disposed of, as aforesaid, (after payment of all my just debts, legacies, and funeral expenses,) I give and bequeath the same and every part thereof, unto my said wife, her executors, administrators, and assigns, to and for her and their own use and benefit absolutely."

The testator then appointed his wife and *Sexton* guardians and executors, giving *Sexton* 20*l* for his trouble, and a ring.

After the death of the testator his widow married *Edward Abbey*. The bill was filed on behalf of the infant [181] daughters, and the decree directed the usual accounts. The Master's report charged the Defendants *Abbey* and his wife who alone acted, with 3370*l* 8*s* 4½*d* in respect of the personal estate received beyond other payments. They had paid the debts and legacies, and had sold part of the real estate, and out of the produce of that sale paid the mortgage of 3000*l*: but the 2000*l* had not been raised. The cause coming on for further directions, the question was whether the personal estate was exempt from the payment of those sums.

Mr. Romilly, and Mr. Leach, for the Plaintiffs.—The question is, whether the mortgage debt and the legacy of 2000*l* are to be paid out of the personal estate of the testator: or whether the personal estate is exempt. It is now settled, that, where there is a devise or charge upon an estate for debts and legacies, and afterwards a bequest of the residuary personal estate, yet the personal estate shall be subject to the debts and legacies, unless the intention, that it shall be exempt, is clearly shown. By this will the residuary personal estate is given expressly subject to the payment of debts, legacies, and funeral expenses. No case has gone to the extent of exempting the personal estate under such circumstances. In *Tait* v. *Lord Northwick* (*a*) the direction to sell the real estate was for the purpose of paying all debts by mortgage, specialty, simple contract, or otherwise: yet that estate was held only an auxiliary fund. So in *Burton* v. *Knowlton* (*b*) it was not argued, that because the real estate was

(*a*) *Ante*, vol. iv. 816

(*b*) *Ante*, vol. iii. 107

directed to be sold for the payment of mortgages and their debts, the personal estate was exempt. Under a devise, subject to a mortgage, which is not in effect different from a devise, in * the first instance to pay the mortgage the devisee would be entitled to have it discharged first out of the personal estate.

1805. HANSON v. ABBOTT. [* 182]

Then, as to the legacy, in the case of *The Duke of Ancaster* v. *Mayer* (a) the estate was subject to all legacies. Can the circumstance, that this is a single legacy, make a difference? The argument upon that must be, that the estate is subjected expressly to this charge, and was intended to be taken *cum onere*, as a specific charge, taking away the value of that legacy. That argument was attempted in *Holford* v. *Wood* (b) without success, and the specific fund was held to be liable only, if the general personal estate should not be sufficient. There is no doubt, that a general bequest of the personal estate is not sufficient, especially if the trustees of the real estate and the executors are the same persons: in which case the inference, that the real estate was intended to be an auxiliary fund, is much stronger; and that circumstance occurs in this case. The personal estate is by this will given after payment of debts and legacies. If the former part of the will shows an intention to exempt the personal estate, the latter part shows an intention to charge it; and that, if there is a doubt, must upon the common rule prevail.

Mr. Alexander, and *Mr. Lewis*, for the *Defendants*.—The authorities cited are cases of a general legacy, and a specific provision for it. But this is not a general legacy, and nothing is given to the legatee but the sum of 2000*l* to be raised out of the real estate. In *Wilson* v. *Lord Bath* (c) there was a charge upon an estate, made by General *Pulteney* in favour of the Plaintiff, for his services, with a covenant to pay the money; and Lord *Kenyon* held, that it was a charge, and the personal estate was not first liable under the covenant. So in this case nothing is given but a sum of money to be raised out of the real estate. *Holford* v. *Wood* (a) is a case of a very different description: a subsidiary disposition, and a distinct bequest of legacies. All the pecuniary legacies were connected with others, which, being specific, could not by possibility come out of that fund; upon which ground it was held clearly subsidiary.

[183]

Next, as to the mortgage: many cases upon this point have been determined, certainly upon very small circumstances: but since the case of *The Duke of Ancaster* v.

(a) 1 *Bro. C. C.* 454. (b) *Ante*, vol. iv. 72.
(c) At the Rolls before Lord *Kenyon*. Cited *ante*, vol. iv. 82, in *Holford* v. *Wood*. (a) p. 185. *Ante*, vol. iv. 76.

1805. Hancox v. Abbey.

Mayer (*b*) the rule has been understood to be, that the personal estate is *prima facie* the fund for the debts; and, to exempt it, either express words or declaration plain are necessary. What is that declaration plain is still a question. The opinion of the Lords Commissioners was, that it appeared upon the will in that case: but Lord *Thurlow's* opinion was different; and the personal estate was held liable in the first place. One circumstance occurs in this case, that was relied upon in *Stapleton* v. *Colvile*, (*c*) that one of the persons to raise this fund out of the real estate, is the executrix, to whom the personal estate is given. In *Hale* v. *Cox*, (*d*) there was a direction in the will, that one debt by mortgage, and all other the testator's just debts and funeral expenses, should be paid out of his personal estate; and afterwards he devised other estates, in mortgage, upon trust to sell; and, after payment of the money due on the mortgage, for his daughter and her children; with power to the trustees

[184] to continue the estates in mortgage. It was unnecessary to mention the first mortgage. Lord *Thurlow's* opinion was clear, that, if the Appeal had not occurred, the personal estate would have been exempted from the latter mortgage, upon the ground that the intention was not to give the devisees any thing but what should remain after a sum sufficient to answer the mortgage debt should have been raised. So, in this instance, a clear intention appears, that the devisees shall take only what remains after the application of so much as will satisfy these sums. There is a clear distinction between an anxious provision for one particular debt, and a general provision for all the debts. The latter case is much more favourable to the argument, that a subsidiary charge only is intended. In *Webb* v. *Jones* (*a*) the personal estate was exempted upon the evident intention, without express words.

Mr. Romilly, in Reply.—This is always a question of intention; of which a very strong and clear indication is required; the personal estate being the fund, which if no other is substituted, must be applied. As between the testator and his creditors nothing can exempt that fund. The cases have gone very much upon the circumstances; and by this will the personal estate is given after payment of all his debts. If the intention is doubtful, if contradiction appears in the will, the personal estate cannot be exempt. *Hale* v. *Cox* (*b*) certainly bears a strong resemblance to this case: but the point was not decided by Lord *Thurlow*; and what he is represented to have said in the judgment, is inconsistent with the rule established in *The Duke of Ancaster* v. *Mayer*, (*c*) and other cases

(*b*) 1 Bro. C. C. 454.
(*c*) For. 202.
(*d*) 3 Bro. C. C. 322.
(*a*) p. 184. 2 Bro. C. C. 60.
(*b*) 3 Bro. C. C. 322.
(*c*) 1 Bro. C. C. 454.

"The point as to the legacy is not so strong as upon the "debt certainly. But this case has a strong circumstance, that was not in *Ilsford* v. *Wood*. (a) It is expressed in this will, that the personal estate shall be the fund for all the legacies, given by the will, and this is a legacy, given by the will, which makes it unnecessary to consider [* 185 whether it is a general legacy, and the personal estate therefore the fund for payment of it"

The Master of the Rolls.—Who do you say is to have the benefit of this exoneration?

Reply.—The devisees of the real estate, who happen to be the heirs at law.

The Master of the R[illegible] As to the legacy of 2000*l.* I cannot consider it as a [illegible] nor conceive the personal estate in any [illegible] charged with it; for that sum is given only as a [illegible] produce of the real estate. The real estate [illegible] upon trust to be sold, and an application of th[illegible] directed, in the first place, to pay the mortg[illegible] and then, in the next place, the trustees [illegible] out; that is, out of the money produced b[illegible] sale to raise the sum of 2000*l.*, which he gives and bequeaths to his two daughters. That means, not, as it is contended for the Plaintiffs, a sum of 2000*l.* in gross, but a sum of 2000*l.* as part of the produce of the real estate. The daughters, therefore, cannot claim it in any other shape than as part of the produce of the real estate. In the subsequent directions relative to that legacy, the testator considers it as raised out of the real estate, and several directions are given as to the payment of the interest and the capital, 186 none of which are applicable to a sum of 2000*l.* generally; but all to the sum of 2000*l.* with all the circumstances previously stated, viz. a sum, arising in consequence of the sale of real estate, and produced by that sale.

As to the mortgage debt, that is a question of much more difficulty. The general rule is now perfectly established; that, in order to exonerate the personal estate, you must find either express words, or a plain intention. I observed in a late case, (a¹) that it might have been better, if what I understood to have been the old rule had been adhered to, that nothing but express words should operate the exoneration of the proper fund. But it is too late now to contend, that the personal estate may not be exonerated by other means. The intention may be found,

To exonerate the personal estate from the testator's debt by mortgage, either express words or a plain intention must be found.

(a) *Ante*, vol. iv. 76.
(a¹) p. 186. *Watson* v. *Brickwood*, *ante*, vol. ix. 447. See page 453.

1805. HANCOX v. ABBEY

not merely in the mode in which the personal estate is given, but also in the mode in which the real estate is given, or the application directed to the payment of that debt, for the real estate may be so appropriated to the payment of the debt as to show a clear intention that it shall not be a burthen upon any other fund, though an intention to exonerate the personal estate is not in any other way expressed This case comes as near to that as possible, viz a declaration of intention, that the real estate shall be exclusively burthened with this debt. It is true, as has been observed for the Plaintiff, that a devise to sell for payment of all debts shall not exonerate the personal estate That shows nothing more than an intention, that all the debts shall be paid, and the real estate, if that is necessary, shall be applied But a direction to apply a particular portion of the real estate for the payment of one particular debt affords a very different inference Why should the testator direct exclusively a particular debt to be paid out of his real estate? It is not generally from an apprehension, that the personal estate may not be sufficient for all the debts, for no precaution is taken, except for this particular debt, and this debt was already a charge upon the real estate Therefore for the security of the debt there was no reason to direct the sale. It is no additional security to the mortgagee For what purpose then could he so specially direct a portion of the real estate to be sold, and the produce applied to that particular debt, if he intended that debt to stand just in the same predicament as any other debt, except only, that it was to be charged upon the real estate; as it already was? Putting that aside, nothing is done by all this particularity of expression. for then this debt stands upon the same footing as all other debts

A devise to sell for payment of all debts will not exonerate the personal estate

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The difficulty stated by Lord *Thurlow* in *Hale* v. *Cox* (a) occurs in this case: who is to have the benefit of this exoneration? How can the devisee make claim to more than is given to him? Here the wife happens to be the devisee for life of the real estate; and has the whole personal estate bequeathed to her, and after her estate for life the remainder of the real estate is devised to the daughters, who are co-heiresses at law. But, suppose it devised to a perfect stranger. When a devise is made, after such sale or sales, and payment of the purchase-money to the purposes aforesaid, of the residue of the estate, how can the devisee claim the whole of the estate, and say, he is to take without any sale before any of those purposes are answered, and not the residue after the sale, and after those purposes are answered; but, that he is

(a) 3 Bro. C C 323.

entitled to the entirety? That is not what is given to him, which is the estate, *minus* the mortgage or legacy. Where an estate is given subject to a mortgage, it is truly said, that does throw the burthen upon the devisee. But that is from the construction the Court puts upon the words, that the testator means nothing more than the law provides; that the mortgage shall continue a burthen upon the real estate. Then the testator, according to that construction, has not said the devisee shall not have the estate, after the mortgage paid out of it. But in this will he has said expressly, that the devisee shall take nothing but the residue, after the mortgage deducted and paid. It would be very strong then for me to say, he shall have the whole; and not the residue after the mortgage deducted; which will be the effect.

1805.

H[illegible] v. A[illegible]

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Then Lord *Thurlow* asks, is the heir to take the benefit? Could the intention be to make this circuitous devise in favour of the heir with the object, that so much shall be undisposed of. Is that a probable intention? Lord *Thurlow* thought it was not. The difficulty was very likely to strike his Lordship, and it is most probable, that suggestion was thrown out by him. It obviously presents itself. He was not called upon to give an express decision upon the point; but he expresses a strong opinion; and Lord [illegible] is the [illegible] who determined *The Duke of Ancaster* v. *Mayer*, [illegible] and was extremely unwilling to exonerate the personal estate without a strong indication of the intention.

The intention in this will is very strongly manifested by the manner in which this devise is made. Then is that intention rebutted by the mode, in which the personal estate is given, it is true, after payment of all just debts and legacies? But if I put the true construction upon the preceding part, and if the intention was exclusively to appropriate the real estate to that particular debt, this part of the will must be construed so as to make it consistent with what was already done. This is not a case of direct and utter repugnance, so as to compel an election, which part shall stand: but, if the construction upon the first part is sound, it may be said in fair reasoning, he means by the latter part to subject his personal estate to all such debts only, as he has not already provided for by subjecting the real estate exclusively to them, for those debts are put out of the question, as if they did not exist; being already amply provided for. Therefore afterwards he provides only for all other debts. The very same expression occurs in *Hale* v. *Cox*, (*a*) only in a different part of the will. It does not appear to have struck

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(*a*) 1 *Bro. C. C.* 454. (*a*) [illegible] 3 *Bro. C. C.*

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Lord *Thurlow*, that this provision, in the preceding part of the will, made much difference as to the construction upon the clause, providing for the particular debt, and the distinction, whether the direction to pay all the debts out of the personal estate is in the beginning or end of the will, is too slight. It might be material, if there was a direct and utter repugnance, that could not by construction be reconciled; not, where it is easy by construction to reconcile any apparent repugnance. If the will shows a clear and manifest intention, that this mortgage shall be a burthen upon the real estate, it amounts to this, that it shall not be considered a debt of this testator's as to his personal estate. A mortgage upon a man's estate, not of his contracting, is not considered his debt payable primarily out of his personal estate (1). On the other hand, a man may make a mortgage debt, of his own contracting, to be considered payable primarily, out of his real estate; and then there is nothing unreasonable in

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considering it with reference to that provision as to be satisfied out of his real estate, and not as to his personal estate debt in any respect. If I am right in my construction upon the last clause, there is no necessity to give an opinion upon the generality of expression in the subsequent clause.

This is my impression upon this case. But I give this opinion not without doubt and hesitation, on account of the strong expressions of Judges in former cases. It is impossible to say, it is so clear, that no doubt can be entertained upon it. If that sort of case is required, certainly it does not exist here, for the direction for payment of all debts and legacies out of the personal estate does raise an ambiguity, to get rid of which you are driven to construction. But the other difficulty, that of disposing of the real estate consistently with the intention, if it is to be exonerated by the personal estate, is greater; for in that way more must be given than the devisees were intended to take: or I must go much further, and consider a great portion of this real estate as undisposed of, and clearly the testator died under the persuasion, that he had disposed of the whole; and, that the co-heiresses were to take in no other character than that of devisees.

The decree declared the personal estate to be exempt, and the 3000*l* having been raised, directed the 2000*l* to be raised by sale of a sufficient part of the real estate.

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(1)

1805.
[illegible]

ATTORNEY-GENERAL *v.* BLACK.

BY indentures, dated the 2d of *September*, 1602, a messuage in *Woodbridge*, and lands in the County of *Suffolk*, were conveyed to twelve persons, as trustees for the maintenance of a free school in *Woodbridge*; and by the orders, made on the foundation of the school, a provision was made, that the schoolmaster should from time to time be appointed by *Robert Marryott*, *Thomas Barwell*, and *Dorothy Seckford*, three of the original feoffees, or their respective heirs male for the time being, and the Curate of the Church of *Woodbridge* for the time being, or three of them; *Marryott* or his heir male for the time being to be one; and, in case no choice should be made within six months after a vacancy, then that the Curate and Churchwardens, and six of the chief inhabitants of the town of *Woodbridge* should within two months after such default choose the schoolmaster; and in case there should fail to be an heir male either of *Marryott*, *Barwell*, or *Seckford*, then for the first defect the elder Churchwarden for the time being should join in the choice from time to time, instead of such heir male; and if there should fail to be an heir male of any two of them, then the other Churchwarden for the time being should join; and if there should not be an heir male of any of them, then from time to time upon every death or removal the schoolmaster should be chosen by the Curate, Churchwardens, and six other of the chief inhabitants of *Woodbridge*, (for the time being.)

Marryott, *Barwell*, and *Seckford*, being all dead without an heir male to any of them, disputes arose as to naming * six of the chief inhabitants, to join with the Curate and Churchwardens in the appointment of a schoolmaster; and upon the last vacancy two persons, *Black* and *Lothbury*, being elected, the information was filed, praying, that the election of *Black* may be declared void, and that he may be removed from the office of schoolmaster, and that the election and appointment of *Lothbury* may be confirmed; and, in case the Court should be of opinion that both elections were unduly made, then that there may be a new election; and that directions may be given as to the future elections.

Petition to the Lord Chancellor, as visitor in right of the Crown, of the free school of Woodbridge; two persons having been elected through the failure of heirs male ... the chief inhabitants at the time of the foundation, and the heir of the survivor, not to be discovered.

Both elections declared void, and a reference to The Attorney General to report, what directions or alterations will be proper as to the mode and right of election, and in the orders, constitutions, and directions, of the school, as shall seem to him most conducive to the interest of the objects of the Charity, and the furtherance of the intention of the donors.

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A petition was presented to The Lord *Chancellor*, as visitor, stating, that the indenture of 1602 did not provide any visitor; also stating, who were the heirs; and that the petitioners are unable to find out, who were the chief inhabitants of *Woodbridge* at the date of the indenture, or, who was the heir of the survivor; and that un

1805. der such circumstances it belongs to The Lord *Chancellor* to visit the school. The petition therefore prayed a declaration in respect of the late election of a master of the school, and directions for the future election.

ATTORNEY-GENERAL v. BLACK.

The Attorney-General, and Mr. *Cullen*, in support of the Petition.—This petition is presented upon the ground, that your Lordship is the visitor; no visitor being provided by the indenture of foundation. Who were the chief inhabitants of *Woodbridge* at the date of this grant cannot possibly be discovered; nor, who is the representative of the survivor of the donors. The effect therefore is the same as a default of heir. The right of visitation is therefore in the Crown, to be exercised by your Lordship. Where the King is a joint founder, his right of visiting supersedes that of a subject; and the whole visi- [193] tatorial power is in the King; for that power cannot be exercised by a subject together with the Crown.

The Lord CHANCELLOR.—My difficulty is, whether the visitor can appoint a master. I should not object to refer it to *The Attorney-General*, who can take to his assistance any one he pleases, to consider and report upon the appointment of some proper person to be the master. The master has hitherto held a freehold in his office; and I doubt very much, whether the visitor can appoint him. It is clear, the Curate and Churchwardens, officiating in some manner with six of the chief inhabitants, are the patrons of the office. It is in their gift; not in the gift of the visitor: and the mere circumstance, that they have made two elections, that are both void, will not authorize the visitor himself to appoint the master; but only authorize him to call upon the persons, entitled to make the appointment.

The Lord CHANCELLOR by the order, as visitor of the said free-school of *Woodbridge* in right of his Majesty, declared both the elections void, and directed the rents and profits up to this time from the death of the testator to be paid to the Defendant *Black* in consideration of his having done the duty since the death of the last schoolmaster, upon undertaking to continue to do the duty until a new election or appointment of a schoolmaster: such rents and profits to be paid to him during the time he shall perform the duty, or till further order; and that it be referred to *The Attorney-General* to consider and report, what directions or alterations touching the mode and right of election and appointment of a schoolmaster upon the

[194] present or any future vacancy will be fit and proper to be

made, and what directions and alterations are proper to be made in the orders, constitutions, and directions of the said school, as shall seem to him most conducive to the interest and benefit of the objects of the Charity, and the furtherance of the intention of the donors thereof. 1804. Attorney General v. Black.

The directions, as originally proposed by the consent of the parties, expressed, that the reference should be to *The Attorney-General*, "or such indifferent person as he "shall appoint." The Lord *Chancellor* ordered those words to be struck out; observing, that it should appear upon the face of the report to be the report of *The Attorney-General* himself, but that he might take to his assistance any person he should think proper.

THE BISHOP OF WINCHESTER v. PAINE. Rolls. July 8 17.

UNDER a bill for the specific performance of an agreement by the Defendant [illegible] purchase an estate an exception was taken to the Master's report in favour of the title of the Plaintiffs, stating, that a bill of foreclosure was filed in *Hilary* Term [illegible], by the Plaintiffs, mortgagees under indentures of [illegible], 17[illegible], to which *Edward Beaver*, the mortgagor, and [illegible] and *Dyke*, subsequent mortgagees, were made Defendants; and *Elizabeth Jones* and *William* [illegible], who were also subsequent encumbrancers, were also added as Defendants: that on the 21st of *June*, 1797, the usual decree was made for the said subsequent mortgagees successively to redeem, or stand foreclosed; and by an order, dated the 4th of *August*, 1798, *Jones* and *Froggatt* were foreclosed; and by an order, dated the 13th of *December*, 17[illegible], *Sumner* * and *Dyke* were foreclosed; but before the mortgagor was foreclosed, he died, on the 16th of *February*, 1799; that in *Trinity* Term, 1799, a bill of revivor and supplement was filed, and the heir and devisee of the mortgagor were foreclosed by the Plaintiffs; and that pending the suit, and in the year 1797, the mortgaged premises were conveyed by *Edward Beaver* to *George Ellis*, to secure 184*l* or any other sum, that might become due from *Beaver*; and also pending the said suit, and in the year 1797, the mortgaged premises were conveyed to *John* and *Sarah Reynolds*, and *Benjamin Collett*, for securing

Effect of *lis pendens* (1) subsequent mortgagees of an Equity of redemption bound by a decree of foreclosure, though not made parties.

An exception by a purchaser on that ground was disallowed, and a specific performance decreed, with costs.

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[(1) *Murray* v. *Ballou*, 1 Johns. Cha. [illegible] v. *Dickenson*, 15 Johns. Rep. 309 [illegible] p. 577, *et seq.* *Murray* v. *Finster*, [illegible] See *Walker* v. *B*[illegible], 1 Yeates 374. [illegible] *Lyates*, 2 Johns. Cha. Rep. 155 158.]

1805. 1340., and at or before the filing of the bill of revivor the Plaintiffs had notice of those two mortgages; and they ought to have brought those mortgagees before the Court, and to have proceeded to a foreclosure against them; and that, not having been made parties, they have a right to redeem against the Plaintiffs (a).

The Bishop of Winchester v. Pike.

Mr Richards, Mr [illegible], *and Mr. Wingfield, in support of the Exceptions.*—There is no decision upon this point. It certainly was not decided in *The Bishop of Winchester* v. *Beavor* (b); though Lord [illegible] expressed an opinion; which however cannot authorize a decision in the case of a purchaser. A mortgage until the foreclosure is nothing but a pledge. A decree of foreclosure gives no more than the right to an account. It is only one step to ascertain what is due; in order that the Court may afterwards say, that, if not paid at a given time, the mortgagor shall not have a right to redeem. Therefore, until the in-

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stant that the foreclosure is pronounced absolute, the mortgage is nothing but a mere pledge, redeemable. It would be singular to give the mortgagee, upon the estate, when it appears, that it is not his, but the estate of other persons, to whom he has conveyed it. Suppose, after the decree he had sold the estate to others; in that case not having the right to redeem, he would not even have the right to pay the money to the mortgagee. The death of the mortgagor increases the difficulty. The person, having the whole equity of redemption, by devise, or otherwise, is to be a party; not a devisee or heir, having no title; the party really entitled being left out. The reasoning, if applicable to the whole equity of redemption, is equally applicable to a partial equity of redemption, the consequence of another mortgage.

Mr Romilly, and Mr Thomson, for the Report.—Though the mortgagor has no interest, yet the mortgagee must proceed to make the foreclosure absolute against him; and it is not necessary to bring the assignees of the equity of redemption before the Court. The case of *The Bishop of Winchester* v. *Beavor* (a) was followed in the late case of *Quarrell* v. *Beckford* (b). Then what difference arises from his death? The mortgagee is not to be embarrassed by the assignment of the equity of redemption. He is to bring before the Court only those, who represent the mortgagor; and they cannot be permitted to mention any assignment, of the equity of redemption, subsequent to the decree. But the Court must of necessity be informed

(a) It seemed to be understood, though the fact was not ascertained, that one of these mortgages was previous, and the other subsequent to the decree of foreclosure.

(b) *Ante*, vol. iii. 314.

(a) p. 196. *Ante*, vol. iii. 314.

(b) In Chancery.

of the death of the mortgagor: otherwise there is no person, against whom the decree of foreclosure can be made. 1805
Lord Walker's opinion was, that the lis pendens was sufficient * notice to make it unnecessary for the mortgagee to have any other person than the representative of the mortgagor a party. The Bishop of Winchester v. Paine. [* 197]

The Master of the Rolls.—The title, which the Master has reported good, consists of a foreclosed mortgage. The objection is, that two mortgagees of the equity of redemption are not brought before the Court, and therefore are not bound by the decree of foreclosure. The answer is, that they became mortgagees after the bill of foreclosure filed, and one even after the decree [illegible]. It is however contended, that the answer is not sufficient in law. First, it is [illegible], that all incumbrancers, at whatever period they became such, must be made parties, to be bound by the decree. [illegible]ly, That, supposing that not generally so, yet in this case, the suit having abated by the death of the mortgagor, the Plaintiff ought, when the suit revived, to have made parties all, who at that time had any interest in the estate. According to my opinion there is no foundation for either proposition: for they seem to be in direct opposition to the established rule of the Court as to the effect of the lis pendens. Ordinarily, it is true, the decree of the Court binds only the parties to the suit. But he, who purchases during the pendency of the suit, is bound by the decree, that may be made against the person, from whom he derives title (1). The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed. Otherwise, suits would be indeterminable: or, which would be the same in effect, it would be in the pleasure of one party, at what period the suit should be determined. The rule may sometimes operate with hardship upon those who purchase without actual notice: yet general convenience requires its adoption, and a mortgage taken pendente lite, cannot be exempted from its operation. [198]

Lord Alvanley's difficulty, as to the mode of directing the reconveyance in The Bishop of Winchester v. Beaver (a) could not have been intended to throw any doubt upon a doctrine so clearly established. Lord Alvanley seems at first to have conceived, that it was insisted, that all en-

(a) Ante, vol. iii. 314.

(1) See H[illegible] et al. v. Beal et al. 3 Johns. Cha. Rep. 459.

1805. incumbrancers universally must be brought before the Court. He was then struck with the inconvenience; observing, that, if that were so, whenever such a bill is filed, the mortgagor may keep off the decree by confessing a great number of judgments to his friends. The Counsel in support of the objection disclaimed all idea of carrying it to that length. They say, "As to the inconvenience, mentioned by the Court, if they confessed judgments *pendente lite*, they would be good for nothing." Lord *Alvanley* therefore in his judgment corrects himself. He puts the case of an incumbrance created after the suit commenced out of the question; and all that follows must be confined to the case of incumbrancers, who have become such before the suit commenced; and, as an argument for bringing them before the Court, his Lordship says, if it is not necessary, the Court might decree a reconveyance to a mortgagor, who by his answer might appear to have not the [illegible] mortgagor has not the title, [illegible] against [illegible] become such *pendente lite*, [illegible] between them only; yet, if from that [illegible] compel the [illegible] to bring all incumbrancers before the Court, you would in effect deny all operation to the rule in the case of mortgages, for there would be no distinction then between mortgages before and after the suit commenced; that is, if the rule operates with any inconvenience to the party, against whom it is intended to operate, the other party in whose favour it is intended, shall have no benefit. It is established now, that if a bill, filed by a mortgagor for redemption, is dismissed, the money not being paid at the time, that operates as a foreclosure, and is equivalent to a decree for foreclosure. Lord *Hardwicke* in *Garth* v. *Ward* (a) said, a decree, dismissing a bill of redemption, would operate equally in favour of the mortgagee against any person to whom the mortgagor should during the pendency of that suit convey, as against the mortgagor himself. After stating other cases, Lord *Hardwicke* expresses himself thus: (b)

The Bishop of Winchester v. Paine.

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Default of payment under a decree upon a bill for redemption operates as a foreclosure.

"So in the case of a mortgagor, who comes here for "redemption: if during such suit he should assign the "equity of redemption, and in the final hearing of the "cause there should be a decree against the mortgagor, "will not the assignee of the equity of redemption be "bound by this decree?"

A *fortiori* must the mortgagee be entitled to the benefit of the rule, where he is not passive; but is actually prosecuting his remedy, which would be wholly fruitless, if

(a) 2 Atk. 174. (b) 2 Atk. 17.

the mortgagor could by making new mortgages compel him to add new parties. 1805.

This is not the case of the legal estate acquired during the pendency of the suit; in which instance it might be necessary, in order to avoid it, to have recourse to a new suit: but this is a mere equity, to be pursued only in Equity; and there it cannot be pursued with effect. Then does the abatement after the two mortgages make any difference? It does not. If these two mortgagees acquired no title as against the Plaintiff in the depending suit, how could they acquire a good title by the death of the Defendant? What connexion has that event with their title; or how could that event vary the relation between the Plaintiff and them? If they would be bound by a decree against the mortgagor, does not the consequence follow, that they shall be bound by the decree against his representative? The heir and devisee are merely in the place of the original party. Their title is by his death; and the suit against them stands in the same plight as it did against him. But the title of the mortgagees is not by the death of the mortgagor; and the suit cannot stand in the same plight as against them. If they are to be brought in at all, a new relief must be prayed against them, that they may redeem, or be foreclosed; which brings it again to the question, whether they have any right to redeem. As they had not originally any such right, and it does not accrue to them, the conclusion is, they have it not. It is then said, this is a new case. How is it a new case? Merely by the purchaser's attempting a distinction, for which there is no foundation in principle or authority. If the mortgagees had acquired their title during the abatement of the suit, there would have been great difficulty. But Lord *Nottingham*, in his Prolegomena of Equity, mentions a case, where that circumstance occurred, and yet the purchaser was bound by the decree, though no party. In the fifteenth chapter is the following passage:

The Bishop of Winchester v. Paine.

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"The Lord *Bacon* in his twelfth rule seems to direct, "that, if a purchase is made *pendente lite* after some long "intermission, this case shall differ from the common "case. But the rule, though reasonable, is not always "observed; for in *Martin* v. *Stiles*, 1663, the bill, filed "in 1640, abated by death in 1648; a bill of revivor was [*201] "filed in 1662, and the purchase was in 1651, and yet "the purchaser was bound."

The purchase there was subsequent to the abatement, and previous to the revivor. Lord *Nottingham* adds, "because now by relation of the bill of revivor it was "*pendente lite: per Clarendon Chancellor*."

1805.

The Bishop of WINCHESTER v. PAINE.

The only circumstance, noticed by Lord *Nottingham* as any deviation from Lord *Bacon's* rule, is, that the purchaser was held bound where there was a long intermission of the suit. He did not conceive it deserving of remark that the purchase was during an abatement, and the purchaser was not a party at the time of the revivor. That case came on afterwards (*a*). But it is unnecessary to give any opinion upon that, for undoubtedly, in this instance, the suit was depending when the mortgages were made. Therefore the mortgagees could never establish in this Court a right to redeem.

The exception was disallowed, and specific performance was decreed, with costs.

(*a*) [illegible]

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July 19. 30. August 10.

To prevent a decree *pro confesso*, the Defendant should have, not only an answer upon the file, but also a receipt for the costs.

The answer being actually filed without payment or tender of the costs, the Defendant was remanded, to give an opportunity of moving to take it off the file for irregularity; but, the Plaintiff having taken an office copy of the answer, that course failed.

SIDGIER v. TYTE.

THE Defendant was brought up upon a [illegible] *Habeas Corpus* for want of an answer.

Mr. Roupell, for the Plaintiff, moved, that the bill should be taken *pro confesso*, suggesting the difficulty from the circumstance, that an answer was put upon the file, observing, however, that it could not be considered an answer, until it was accepted, and the costs of the contempt were paid or tendered, and the Plaintiff had not done any act, accepting the answer: nor had the costs been paid or tendered; therefore, if the answer had been put upon the file by the Defendant's Clerk in Court it was irregular; and the consent of the Plaintiff's Clerk in Court was necessary.

Mr. Leach, for the Defendant, insisted upon the certificate, that the answer was upon the file, which was produced, that the decree could not be taken.

Mr. Hart, (amicus curiæ,) said, the mere production of the answer to the Six Clerk is not sufficient. There must be payment or tender of the costs.

The Lord CHANCELLOR said, a receipt must be given for the costs: but then the difficulty was, how the record could be made consistent; showing a decree *pro confesso* and the certificate, that an answer was filed; from which it must be taken, that all is regular. His Lordship there

fore said, a motion should be made, that the answer shall be taken off the file for irregularity: so as to make it impossible for the officer to give that certificate, and in the mean time the Defendant must be remanded. A motion was accordingly made, that the answer be taken off the file. 1805. Sharpe *v.* Tait.

Mr. Leach opposed the motion; insisting, that the Plaintiff, having taken an office copy of the answer, was precluded from saying, it was not an answer. [203]

The Lord Chancellor, having directed a search in the Register's office, and, that, after having taken an office copy of the answer, the Plaintiff could not treat [illegible], and therefore refused to make the order.

Ex parte SHARPE.

July 25.

Creditor not bound to elect to proceed at Law or under a Commission of Bankruptcy before a dividend; therefore, having the Bankrupt in custody on mesne process, was permitted to vote in the choice of Assignees.

[illegible] the petition brought an action; and [illegible] the Defendant upon mesne process, who continued [illegible] at the suit of the petitioner and [illegible], and upon the 20th of *June* following a Commission of Bankruptcy issued against him. The petitioner proved his debt, amounting to [illegible]*l.*: but the Commissioners afterwards refused to permit him to vote in the choice of Assignees, on the ground, that he was proceeding at Law, and had the Bankrupt in custody. The petition prayed [illegible] the Defendant may be permitted to vote in the choice of Assignees without being obliged to discharge the Bankrupt.

Mr. Cullen, in support of the Petition, observed, that the object of this proof was merely to have the opportunity of assenting to, or dissenting from, the certificate; not to take a dividend: according to the distinction in *Ex parte D'Orvilliers*, (*a*) admitting, that for that purpose the creditor must elect; not however, before the fund is ascertained. (*b*) The cases *Ex parte Williamson* (*a*) and *Ex parte Botterill* (*b*) were upon execution, not mesne process. [204]

Mr. Horne resisted the Petition, upon the authority of those cases, observing, that *Ex parte Botterill* was a case of distinct debts.

Mr. Cooke, being referred to by The Lord *Chancellor*, said, a difference of practice prevailed among the Com-

(*a*) 1 *Atk.* 221. (*b*) *Ex parte Callow, ante*, vol. iii. 1.
(*a*) p. 204. 1 *Atk.* 82. 2 *Ves.* 249. (*b*) 1 *Atk.* 104.

1805. missioners, some putting the creditor to election upon offering to prove: but apprehended, the creditor could not be put to election until a dividend.

Ex parte SHARP.

The Lord CHANCELLOR.—The creditor, if he has the debtor in execution before the Commission, is not put to election, until he knows the state of dividend. Why, if he is in a term of suing, should I call upon him to elect? He is at liberty to go on to place himself in the same situation as if he had sued before the Bankruptcy, until he takes execution: then he takes another satisfaction: but I will not stop him in going on towards execution, until he knows the dividend.

The order was made.

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WILSON *v.* MAJOR.

ROLLS. *August* 6.

Testator devised a copyhold estate to his wife, upon trust to sell, and invest the money in the funds; and gave and bequeathed the interest and dividends to her use.

He also gave and bequeathed to her all his effects whatsoever and wheresoever for her maintenance, upon full trust and confidence in her justice and equity that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects as part of their shares. The widow, executrix, entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir. The widow entitled to the absolute interest in the personal estate.

THOMAS MAJOR by his will, dated the 28th of *June*, 1797, reciting, that he was seised of a copyhold estate in the Parish of *Long Crendon*, *Bucks*, which he had surrendered to the use of his will, gave and devised the said premises, with the arrears of rent, unto his wife *Dorothy Major*, upon trust and confidence, that, as soon as conveniently could be after his decease, she should sell and dispose of the same, and invest the money arising therefrom in real or government securities, or in the public funds, at her discretion, and he gave and bequeathed the interest and dividends of the same to the use of his said wife. He also gave and bequeathed to her all his effects whatsoever or wheresoever for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects as part of their shares, and he appointed his wife executrix.

The testator at the date of his will had four children living: *John*, *James*, *Dorothy*, and *Susannah*. He had another daughter *Elizabeth Clarke*, who died before the date of the will, leaving three daughters. *John*, the testator's eldest son, died in the life of the testator, leaving

five children. The testator died upon the 29th of *December*, 1799. His widow was admitted to, but did not sell, the copyhold estate. She proved the * will, and possessed the personal estate. By her will, dated the 19th of *July*, 1802, declaring, that she made that her will for distributing and disposing of all her estate and effects whatsoever and wheresoever (both real and personal, (the whole or nearly the whole thereof having been the estate and effects of her husband,) agreeable to what she doubted not was really and substantially the intention of her husband, she empowered her only surviving son *James*, or his heirs, executors, or administrators, as soon as might be after her decease, to make absolute sale of all her husband's landed estate, and to receive the money, and to convert all the effects of her husband into money, and to divide, pay, and apply, the same, after paying his debts, (if any,) and her own debts, &c. as after-mentioned; and, reciting the power given her by her husband's will, and taking notice of the state of her family then and at the time of his death, and, that by the papers left by him it appeared, that certain sums had been advanced by him in his life to his four children, she declared, that after such addition the division should be of the aggregate sum, to which the clear produce of her and her late husband's estate and effects should amount; and which division she declared should be in five equal parts; and, that one of such five parts should be paid to her daughter *Susannah*, and that one other of such five parts, after deducting thereout the sum of 112*l.* 16*s.* 8*d.* which had been advanced, should be paid to *Dorothy* for her own use; that one other fifth part, deducting 330*l.* advanced to *John Major*, should be paid to and between his five children equally, that another fifth, deducting 115*l.* 6. advanced to *Elizabeth Clarke*, to and between her three children, equally; and that the other fifth, deducting 330*l.* advanced to *James Major*, should be retained by him. The testatrix appointed her son *James* her executor.

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The testatrix died on the 23d of *February*, 1803. The bill was filed by *Dorothy Wilson*, the daughter of the testator and testatrix, claiming under the will of her father; and praying a sale of the copyhold estate. [207]

(*a*) *Mr. Romilly, and Mr. Roupell, for the Plaintiff*, contended, that the testator's widow under his will took the dividends of the fund, to be produced by the sale of the copyhold estate, for her life. A trust arose as to the capital for the children, according to the case of *Pierson* v. *Garnet*, (*b*) and that though the word "effects" will not of

(*a*) The argument and judgment *ex relatione*.

(*b*) 2 *Bro. C. C.* 38. 226. *Finch's Prec. Ch.* 210. *Malim* v. *Keighley*, *ante*, vol. ii. 333. 529. *Brown* v. *Higgs*, *ante*, vol. iv. 708. vol. v. 495. vol. viii. 561.

1805. itself give an interest in real estate, coupled with other words it may have that effect.

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Mr. Alexander, and *Mr. Hart*, *for the Grandchildren*.—The grandchildren are entitled under the will of the widow This is, neither a gift to the children, nor a power, but an absolute bequest to the widow, who might therefore dispose, as she pleased To raise a trust the objects and the subject must be certain.

As to the claim of the heir, by way of resulting trust the words of the will "all my effects" are sufficiently large to embrace this interest This estate is directed to be converted into personalty out and out. It is given to be sold The will uses the words "interest and dividends," applicable to personal estate. The produce of the sale is part of the testator's effects. This is a bequest, not of the residue, but of all his *effects*: a word, which in *Hogan*
[208] v. *Jackson* (c) was considered equivalent to "worldly substance;" and the effect is a bequest of all his property. The money to arise by the sale of the copyhold estate must go in the same channel as the residue.

Mr Bell, *for the Heir*, relied on *Ackroyd* v. *Smithson*, (a) and the other authorities for a resulting trust

The Master of the Rolls.—The wife took only an interest for life in the money to be produced by the sale of the copyhold estate. This is an express trust: not a discretion; a trust to sell, and the money to be laid out. The testator could not intend to give her the capital absolutely. The words exclude that supposition, made in *Philipps* v. *Chamberlaine* (b) The question then is, whether the subsequent words "all my effects" enlarge the first words, giving only interest for life. He could not have intended to give her the absolute interest, in that, in which he had before given her a life-interest. If I throw the capital of this fund into the general residue, it necessarily gives her the whole. I cannot agree, that there are two residues. Nothing points to a double residue. If the wife takes only an estate for life by the first words, I cannot give her the absolute interest by the subsequent words Here is no declaration of the trust of the money, produced by the sale of the copyhold estate, beyond the life of the wife. That therefore must result to the heir. The operation of the word "effects" is controlled by the former part of the will, which gives her only an interest for life, in which respect this case is distinguished from *Mallabar* v. *Mallabar* (c). Declare, that the widow was entitled to the absolute interest in the personal estate.

(c) *Cowp* 299

(a) p. 208. 1 *Bro. C C* 503 See *Berry* v *Usher*, *ante*, 87. *Wilbar* v *Conde*, *ante*, vol x. 500, and the references (b) *Ante*, vol iv 51

(c) *Fer.* 78, cited from a MSS note, *ante*, vol. x 507

CASES

IN

CHANCERY, &c.

THE SITTINGS AFTER TRINITY TERM, 45 GEO. III. 1805.

1804. July 19, 20. Nov. 20. 23. 1805. July 15, 18.

PARKES v. WHITE (1)

Power of disposition of a *feme covert* over estate settled to her separate use.

A sale by the husband and wife by fine was under all the circumstances established as to the separate estate of the wife for life and her reversion in fee; though to the trustee for her separate use, and to support the contingent remainders but set aside as to the remainders, to such persons, and uses, &c. as she should appoint by will, and, in default of appointment, to her children, upon her bill, and two wills, obtained from her, decreed to be delivered up.

CATHERINE PARKES being seised in fee of freehold estates in the County of *Essex*, and seised to her and her heirs of copyhold estates according to the custom of the Manor of *Fryerning*, by indentures, dated the 24th and 25th of *April*, 1778, previous to her marriage with *William Parkes*, the freehold estates were conveyed to *Thomas White* and his heirs, to the use, after the marriage of *Catherine Parkes* for life, without impeachment of waste; and, after the determination of that estate, to the use of *White* and his heirs during her life, to support contingent remainders, yet nevertheless to permit her and her assigns to receive the rents and profits during her natural life, for her sole and separate use, free from the debts, &c. of her husband; and from and after her decease to the use of *White*, his heirs and * assigns; in trust for such person and persons, and for such estate and estates, uses, intents, and purposes, as *Catherine Parkes*, notwithstanding her coverture, should by her last will in writing, or any writing purporting to be her will, duly attested by three witnesses, limit and appoint; and in default of such limitation or appointment, and if there should be only one child of such marriage living at her death, then to the use of such only child, his or her heirs and

(1) Cited and remarked upon, 3 Johns. Cha. Rep. 10[illegible] 17 Johns. Rep. 579. 587, and 1 Desaus. Cha. Rep. 4[illegible]1.

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1805 assigns for ever; but, in case he should have more than one child, then to the use of *White*, his heirs and assigns, upon trust, that he, his heirs and assigns, should, within twelve months after the death of *Catherine Parkes*, sell the trust estates, and divide the money among all and every such child and children, at their respective ages of twenty-one years, or marriage, if daughters; and, in case any such children should be then under the age of twenty-one, then the said trustee, his heirs, &c. should lay out the shares of him, &c. in government securities, the dividends to be applied for maintenance, &c.; and at twenty-one or marriage the principal to be transferred; and, in default of such issue, then in trust for the use of the right heirs of *Catherine Parkes*. The settlement contained a covenant with *White* to surrender the copyhold estates to the same uses; which were surrendered, and *White* admitted, accordingly.

PARKES v. WHITE

The bill was filed in 1802, by *Catherine Parkes*, by her next friend, against *White*, *Thomas Quarman*, and the Plaintiff's husband, praying an account, and a conveyance by *White* and *Quarman* to new trustees, to be appointed by the Master; charging, that if the Plaintiff had executed any instruments, purporting to be a charge or conveyance of her estate, it was without good or valuable consideration, and under the control and influence of her husband and *White*; that *White* had attempted to make undue advantage by taking a conveyance of

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the trust estate from the Plaintiff; that he applied to his own use the rents and profits; and that *Quarman* had notice of the settlement, and had taken a bond of indemnity from *White*.

The relief prayed by the bill, was resisted upon the different transactions and conveyances, that had taken place with respect to this estate, under which it was claimed by the Defendant *Quarman*, as a purchaser for valuable consideration. By indentures, dated the 15th of *May*, 1779, *White*, at the request of *Parkes* and his wife, and in consideration of 200*l.* paid by *Thomas Evans* to *William Parkes*, the receipt on the back expressing, that the money was received by him, and with the consent and approbation of *William* and *Catherine Parkes*, testified by their executing the indenture, granted, and *William* and *Catherine Parkes* released and confirmed her life estate to *Evans* for ninety-nine years, if *William* and *Catherine Parkes* should so long live, to secure the money advanced, with a covenant to surrender the copyhold estate.

By indentures, dated the 16th and 17th of *May*, 1785, reciting, that *Parkes* and his wife were entitled to sell the trust estate, in consideration of 200*l.* due to the estate of *Evans* and paid to *Judith Evans*, his administratrix, and

of 800*l* paid to *Parkes* and his wife, *Judith Evans*, and *White* at the request and by the direction of *Parkes* and his wife, conveyed and agreed to levy a fine to *Joseph Evans*, the son and heir at law of the mortgagee, and his heirs, and *William Parkes*, the husband, gave his bond of the same date to *Evans*, reciting, that *William Parkes* had applied to *Evans* to purchase the estate, which he agreed to do for 1000*l*; that a conveyance was executed accordingly, and that, to complete the title, *Catherine Parkes* had devised to *Evans*, and appointed him her executor, with condition for indemnifying *Evans*, his heirs &c. against any act of *Parkes* and his wife, their heirs, &c. under any power in the settlement of 177[illegible] *Parkes* and his wife levied a fine accordingly. In [illegible] following, *Evans* in consideration of 1000*l* conveyed to *White*. In [illegible] *White* in consideration of [illegible] conveyed to *Quarrington* and his heirs, and gave him a bond of indemnity, particularly against *Parkes* and his wife.

Another instrument was executed by *Catherine Parkes*, and her husband, dated the 19th of [illegible], 179[illegible], acknowledging [illegible] from *White* [illegible] the difference between [illegible] upon the purchase [illegible] received upon the [illegible] deduction for costs [illegible] and other losses and expenses, reciting [illegible] to complete the title that [illegible] should make a will in favour of [illegible] and [illegible] for that purpose that they executed [illegible] leaving the estate to *Quarrington* and his heirs, and mutually promising and engaging, [illegible] not to execute any other will and devise [illegible] to [illegible] *Quarrington* and his heirs, &c.

At the time of the purchase by [illegible] the net rent was 36*l* per annum.

The Defendant *Quarrington* stated a conveyance in fee to him from *White*, by lease and release, dated the 16th and 17th of *October*, 179[illegible], in consideration of 1400*l*; insisting, that he had notice, when he paid his money, and being advised, that notwithstanding the indentures, which appeared to have been executed by the Plaintiff and her husband, and *White*, and a fine, levied in pursuance of a covenant in one of the indentures, there was still a defect in the title, he therefore took from *White* a bond of indemnity, particularly against the claims of *Parkes* and his wife, and her heirs. He claimed the benefit of his purchase, as made without fraud; and if the Court should be of opinion, that he is not entitled as absolute purchaser, insisted, that as against the Plaintiff herself he is entitled to hold the same, or be allowed the rents and profits re-

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ceived, on account of the 1500*l*. and interest, and to stand as a mortgagee for the remainder of the 1500*l*. and interest to the full amount of the principal and interest of all monies *White* may have advanced for the use or by the direction of the Plaintiff.

Mr. Hollist, and *Mr. Hart*, for the Plaintiff.—This suit is instituted on behalf of a *feme covert*, seeking the protection of this Court, an inquiry into her rights by contract upon marriage, and to be reinstated in the enjoyment of those rights. The Defendants are her husband, rather a formal than a real, party, and the trustee, who has not only joined in the transaction, but has himself obtained the estate. *Laches* is not imputed to a *feme covert* even at Law: much less, in such a case, in Equity, against a trustee, charged with the duty of preventing such an act. Interposed to protect her, and prevent her dealing with others, he deals and tampers with her interests himself. In such a case the length of time, during which she is unable to come for relief, is no objection. In a very distressed situation, she could not stir, and till 179[illegible] she did not know that *White* had an interest. No evidence is given of the fairness of these transactions. The husband might receive the rents; and perhaps his demise, independent, might have formed a good charge during [214] his life. As to the Plaintiff's claim to the by-gone rents and profits, when the fine was levied, the Defendant *White* ought as trustee to have entered, received the rents, and paid them to the separate use of the Plaintiff. If a trustee joins in destroying remainders, as in *Mansell* v. *Mansell*, (a) and the subject can be pursued, it shall be pursued and brought back. In this instance there is no difficulty. It gets into the hands of the trustee himself, and from him to a purchaser with notice, taking an indemnity from the trustee.

But, whatever may be the decision as to the rents, bygone, or to come during the joint lives of the Plaintiff and her husband, this estate must be recalled to the uses of the settlement, and the interest of the Plaintiff, subsequent to the joint lives, must be protected. The trustee adopted this mode of becoming the purchaser; conscious, that it was not competent to him to take a conveyance directly to himself. Under circumstances of so suspicious a nature inquiry is necessary, whether *Evans*, the encumbrancer, was not from the first a trustee for *White*, as the heir at law was avowedly in the second instance. The principle, as now established, is, that a purchase by a trustee from his *cestuy que trust* (b) appears under much

(a) 2 *P. Wms.* 678.
(b) See *Randall* v. *Errington*, *ante*, vol. x. 423. *Coles* v. *Trecothick*, *ante*, vol. ix. 234, and the references.

suspicion; and, whenever a question is made upon the fairness of the transaction, the instrument shall not have the effect, it would have between strangers, but the trustee must show, that, before he dealt, he put himself into a situation, in which he could with propriety deal adversely with the *cestuy que trust*, substituting some other person in his place, to guard those rights he originally undertook to protect. This trustee does not show, that he called the attention of the Plaintiff to her situation, and pointed out to her the necessity, if he should assume a different character, proposing to contract with her, that she should have some third person to deal with him. He does not show, that any Attorney but his own was employed, that he represented to her, that she was to part with nothing more than her husband could compel her to part with. These instruments afford sufficient evidence of breach of trust to entitle the Plaintiff to a decree, that they shall be delivered up, at least to an inquiry. The bond of indemnity from *White* to *Quarman* is evidence that the latter knew he purchased subject to an equity.

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If, as it is held in *Sockett* v. *Wray*,(a) a married woman is to be considered a *feme sole* only to the extent the instrument makes her such, this settlement according to the true meaning gives her power to dispose by will only, and a deed, executed by her, cannot have the effect of a will as to this estate against the rights of her children. The transaction, by which the execution of a will was obtained from her, is such as a Court of Equity will not allow to take place between a *feme covert* and her trustee, and that circumstance raises a presumption as to the nature of the antecedent transactions. In most of the cases, where a married woman has acted upon her separate property, she was acting by contract. In *Dixon* v. [illegible](b) Sir *Thomas Clarke* would not make a decree, affecting the separate property, until the Plaintiff had outlawed the husband; showing, that every step had been taken against him. Whatever may be the authority of *Whistler* v. *Newman*,(c) it establishes this very salutary rule, that in such a case the Court will direct a reference, that all the circumstances may be developed. But that case was much weaker than this.* There was no imputation, that the trustee dealt for his own benefit, or acquired any advantage, that he had not before. Upon that decision this transaction cannot be maintained.

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Mr. Hall, for the Defendant, White: Mr. Raupell, for the Defendant Quarman.—This is a strong case; a Plaintiff coming after a lapse of seventeen years to disaffirm all her acts, of the most solemn description, claiming a ge-

(a) 4 Bro. C. C. 483. (b) C. C. 17. (c) Ante, vol. iv. 129.

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neral account, without offering an allowance even for money actually advanced. Upon the principles, stated by Lord *Camden* in *Smith* v. *Clay*(a) and in *Lord Deloraine* v. *Brown*,(b) and *Henry* v. *Dinwoody*,(c) length of time is a bar even to a plain right. The situation of *White*, as trustee, is not clear. The first estate under this settlement is a legal estate, executed in the Plaintiff, which therefore during her life was in her and her husband. After the determination of that estate *White* was to be a trustee to support contingent remainders, and then certainly the Plaintiff would have had an equitable estate. At the time of this contract of purchase *White* was not a trustee, but the mere instrument, through whom the legal estate is transferred by the effect of the Statute.(d) The forfeiture of the estate for life by the fine can be taken advantage of only by the remainder-man, not by this Plaintiff. The supposition of control by the husband is answered by the mode of conveyance; a fine, levied seventeen years before the bill was filed; the protection of the Law interposed to the transaction between them, and repeated acts of con-[217]firmation, by this Plaintiff, receiving money, and giving acknowledgments, down to 1799; bringing this within the principle of *Chesterfield* v. *Janssen*,(a) even if the transaction originally could not have stood. But upon the circumstances there is nothing unfair in this transaction; and the mode of conveyance is only form. In *Fox* v. *Mackreth*,(b) Lord *Thurlow* was alarmed at overturning a transaction after three years and a half. Taking it, that the Plaintiff had only a trust to her separate use in this estate, she was competent to dispose of it, having, in the consideration of this Court, as complete dominion over it, as if she were not married. Such an interest has all the incidents of absolute property; the power of disposition therefore in any way, as if she was a single woman. This Court has even called upon a trustee to give effect to the conveyance of a married woman. *Penne* v. *Peacock*.(c) So far from withholding or rescinding the conveyance, where the transaction is fair, the Court will carry it into effect by joining the legal to the equitable estate, and though the attempt is made by the most informal instrument. Even where she has joined with her husband in a bond, execution has been given upon that bond against her separate property. *Standford* v. *Marshall*.(d) *Peacock* v. *Monk*.(e) *Hulme* v. *Tenant*.(f) *Pybus* v. *Smith*.(g) *Ellis* v. *Atkinson*.(h) *Biscoe* v. *Ken-*

(a) Amb. 645. 3 Bro. C. C. 639.
(b) 3 Bro. C. C. 633.
(c) 4 Bro. C. C. 257. Ibid., vol. ii. 87.
(d) Stat. of Uses, 27 Hen.
(a) p. 217. 2 Ves. 125. 1 Atk. 301.
(b) 2 Bro. C. C. 400.
(c) Fo. 41.
(d) ? Ibid. 63.
(e) 1 Ves. 193.
(f) 1 Bro. C. C. 16.
(g) 3 Bro. C. C. 340. Ante, vol. i. 189.
(h) 2 Bro. C. C. 310, n. 562.

nedy,(i) so far from disturbing, proceeds upon the principle, that a married woman, having separate property, is a free agent in this Court to deal with that property, and has the right of disposition with the other inherent qualities of property. In that case the first bill was dismissed, as the Plaintiff had not got execution against the husband; but in the second suit the creditor obtained a decree, affecting the separate property, though the bond, being previous to the coverture, was not taken with a view to the separate property. In *Bonyon* v. *Collingston*,(a) the transaction prevailed to the extent of the wife's interest. The single case, in opposition to all these authorities and to principle, is *Whistler* v. *Newman*.(b)

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This is not the case of a trustee to sell; but with reference to that case it cannot be stated, as a general proposition, that a trustee to sell cannot purchase the property. The rule is laid down with great caution in *Campbell* v. *Walker*(c) by Lord *Alvanley*, who acknowledges the difficulty of these cases, and states the mode by which it may be done: and that the party cannot come to complain at any distance of time.

Mr. Hollist, in Reply.—The doctrine of length of time and acquiescence does not apply to the case of a *cestui que trust* and a trustee misconducting himself. It does not appear that this Plaintiff received any part of the money. Until 1799 she knew nothing; then she complains: and, to cure the defect of title, an offer is made to her of 200*l* upon the terms of her making a will, appointing to *Quarman* in fee.

It is true, *White* was not a trustee to sell. But he was guilty of a breach of trust by selling, and for his own benefit; his duty requiring him to preserve this estate in this family, which without his interference would not have been sold. The wife is entitled to complain with reference to her estate for life, the provision for her separate use pervading the whole. The case of *Whistler* v. *Newman* was followed and confirmed by *Mores* v. *Huish*,(a) in which the bill was dismissed with costs. As to the period, from which the account should be given, it is due at least from the time of filing the bill; according to the course that has been adopted of late. [219]

The Lord CHANCELLOR.—It is absolutely necessary, that the children should be parties. This suit has two objects: 1st, to clothe the legal estate, that is in *Quarman*,

(i) 1 *Bro. C. C.* 17, *n.*
(a) p. 218. As to this point stated *ante*, vol. iv. 134, in *Whistler* v. *Newman*.
(b) *Ante*, vol. iv. 129.
(c) *Ante*, vol. v. 678.
(a) p. 219. *Ante*, vol. v. 6[illegible]

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with all the uses of the settlement upon the Plaintiff's marriage, at least subsequent to the trust for her separate use: 2dly, for a declaration, as to her interest, notwithstanding her acts, and the remote periods, when those acts were done, that the Defendants, *White* and *Quarman* may be considered trustees of the rents and profits during the whole time for her separate use. The consideration is very different, whether *Quarman* is a trustee for those, who will be entitled after the Plaintiff's death, and, whether he is a trustee for her during her life. If she has a right to agitate the question with him upon the possible right of the children, they ought to be parties, otherwise different judgments might be given in the suit of this Plaintiff, contending for her children, and afterwards in a suit instituted by the children themselves. No decision that I can make now will bind them, not being parties; or prevent a bill by them.

As to the children, I lay out of the case the circum-
[220] stance, that *White* was the trustee, and suppose him not to have been dealing in the purchase, and to have incurred all that suspicion, that was thrown upon the trustee in *Whistler* v. *Newman* (a); (the suspicion, that, as he was a creditor, the money was raised for his benefit; which certainly had great influence upon the Court, much more than upon my mind;) but suppose, being pressed by the wife, he had merely joined in the conveyances, destroying, as far as he could, the contingent remainder as to the children, and the interests that might be taken under her will, or by her heirs, every person to whom *White* conveyed would be a trustee, in the same situation, as to those, who took no part in the act. Therefore, as to persons claiming subsequently to the husband and wife, *Quarman* took the estate, as *White* had it, and upon a bill after the death of the husband and wife by the children they would be held entitled to the estate. The question as to the right of the children is very different from the points arising upon the part of the wife herself. Her interest is formed either by a legal estate, vested in her, or an estate to her separate use. That estate, for her life, might be destroyed: but the consequence would be, that the remainder vested in *White* and his heirs, in trust for her separate use, and the subsequent limitations were either vested in Law and Equity, or vested in Law and contingent in Equity, as they seem to be.

The first question then is, what could the wife do with this estate? What could she lawfully do, with respect to her own interest only, not meaning to deal as to those,

(a) *Ante*, vol. iv. 129. See as to that case *Sperling* v. *Rochfort*, *ante*, vol. viii. 164. *Jones* v. *Harris*, *Wagstaff* v. *Smith*, *ante*, vol. ix. 486. 525.

who would be entitled after her decease? It is extremely important, that this question should be once for all well decided. My mind is in great distraction * upon that subject. In *Whistler* v. *Newman* (*a*) I considered every point as settled; unless the case could have been decided upon the circumstance, that *Maidment* was improperly dealing for his own interest. If it is asserted, that, though Lord *Thurlow*, following his predecessors, as far back as the doctrine can be traced, repeatedly decided upon this principle, this Court has now a right to refuse to follow it, I am not bold enough to act upon that position. Previously to *Whistler* v. *Newman*, *Ellis* v. *Atkinson*, (*b*) *Pybus* v. *Smith*, (*c*) *Hulme* v. *Tenant*, (*d*) *Peacock* v. *Monk* (*e*) and other cases, had been determined. No Judge ever felt so strong an inclination to say, the act should not avail, as Lord *Thurlow*, in *Ellis* v. *Atkinson*; and more particularly in *Pybus* v. *Smith*; in which case his reasoning was unanswerable, if the point had been open. Upon principle, a woman contracting marriage loses all the powers she had as a *feme sole*; and yet this Court allows her to place herself by contract in the situation of a *feme sole*; and so it was at law, though it is now got rid of there (*f*). Lord *Thurlow* said, upon true principle, that, if the contract makes her a *feme sole*, as to her faculties, as such, the nature and extent of them, are to be collected from the terms of the instrument, making her such. In *Pybus* v. *Smith* (*g*) this Court exerted all its providence; the trustees were to receive the dividends, and from time to time to pay them into the proper hands of the wife, receipts to be given from time to time, &c. The words "and not "by anticipation," were inserted in *Miss Watson*'s settlement, in which Lord *Thurlow* was a trustee, and took great pains to defeat what he took to be established by the authority of this Court. Notwithstanding all that was expressed in *Pybus* v. *Smith*, Lord *Thurlow* felt himself bound by authority to say, those words have no more effect than to create in the view of this Court a separate interest of the wife in the property; and in *Georges* v. *Fettiplace* (*a*) Lord *Thurlow* thought the expression used in that will equivalent to all these words; and gave the wife a right to receive the property with her own hands from time to time; and to dispose of it by deed, and by will also.

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Contract by a *feme covert* void at Law.

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The principle therefore is, that all these words are only

(*a*) *Ante*, vol. iv. 129. (*b*) 3 *Bro. C. C.* 565.
(*c*) 3 *Bro. C. C.* 340. *Ante*, vol. i. 189. (*d*) 1 *Bro. C. C.* [illegible]
(*e*) 1 *Ves.* 1[illegible]. (*f*) See the references in the note, [illegible]
(*g*) 3 *Bro. C. C.* 340. *Ante*, vol. i. 189.
(*a*) p. 223. 3 *Bro. C. C.* [illegible] *Ante*, vol. i. 46.

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an unfolding of all, that is implied in a gift "to the separate use." Lord *Thurlow* made that decision in *Pybus* v. *Smith* (b) with great reluctance; thinking the Act proposed most unrighteous. But he looked back to authorities; and found, that he had occasion to consider the subject very much in *Hulme* v. *Tenant*. (c) About that time this Court had no difficulty in supposing, a woman, having such an interest, might give it to her husband, as well as to any one else. These cases never intended to forbid that; and, if he conducts himself well, I do not know, that she can make a more worthy disposition; though certainly the particular act ought to be looked at with jealousy.(1) In that case there was a very formal creation of a limitation to the separate use; which is not necessary; for if the intention can be collected, the effect is just the same. The wife executed no formal instrument. But she put her name to a bond together with her husband; an instrument, with regard to which at Law the plea "*non est factum*" might have been put in. It was an

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absolute nullity; except as a paper, with reference to which her intention was supposed to be stated; but not as the settlement required. Lord *Thurlow* however thought himself bound by authority to say, as she could have no other intention than to charge her separate estate, that informal instrument was such a charge; and he by decree executed that intention; recurring back to all the cases, in which informal acts of different sorts had been held a sufficient denotation of the wife's intention. The subsequent case, (a) to which I have alluded, is a declaration of Lord *Thurlow*, as a trustee, as to his opinion of the doctrine of this Court, conformable to his acts.

Then came the case of *Whistler* v. *Newman*, (b) upon which it does not become me to make any other remark, than that, when this case comes on to be argued again, it must be considered, how far that case is consistent with the preceding authorities; if it is not, then whether it was competent to the Court in that year to refuse to make a decree, consistent with all the declarations of this Court for a century. It is true, *Maidment* was a creditor: but it is obvious, the transaction had no direct reference to him as a creditor, as in this instance there is to the trustee, as a purchaser of the interest of the wife. A bond of indemnity was given in that case; but no idea was entertained, that any bond of indemnity was wanted as against the wife; for the report expressed it to

(b) 3 *Bro. C. C.* 340. *Ante*, vol. i. 189. (c) 1 *Bro. C. C.* 16.
(a) p. 223. Upon *Mrs. Watson's* Settlement. (b) *Ante*, vol. iv. 1[illegible]

(1) *Bradish* v. *Gibbs*, 3 Johns. Cha. Rep. 523.

be on account of the interest of the future children. It is one thing to say, the trustee is well warranted in not acceding to the act, and another, that he has done wrong by acceding. It is said, a trustee ought never to join in aiding a married woman to give away her separate property. If this Court has established, that she can give it, and the mode by which she can, it is extraordinary to say, she has not given it, because the trustee joins with her. [224] I never heard before, that, if she had executed an instrument that would be a good disposition, especially if for valuable consideration, this Court would refuse to execute that disposition in favour of a person entitled for valuable consideration, and to call upon the trustee to clothe him with the same right the wife had. Can it be said upon just reasoning, that her act alone will give the person a right to come for a decree against the trustee; and, that the Court will make the decree; and yet the act, in other respects good, is not good, because the trustee joins in that act which the Court would order him to do? That cannot be; and, if no other observation can be added, but, that it is to satisfy the debt of the husband, unless the doctrine is, that she may give to every one but the person, in whose favour upon the most proper and meritorious obligations she may be influenced to act, that is not an objection.

With reference to these principles how does this case stand in fact, attending to the interest of the Plaintiff only? Suppose her a *feme sole*, as this Court considered a *feme sole* under a trust for her benefit, the question is, whether it is possible to guard her interests better than by considering her in the ordinary situation of any other *cestuy que trust*; that she may dispose of such an interest, as she might bar any other estate, by fine; and, whether the various obligations she comes under in these different instruments are not obligations, affecting her separate trust estate full as much as the execution of the bond in *Hulme* v. *Tenant*, (a) and especially it must be considered, what is the effect of her having both levied a fine and come under those obligations. If she meant no more than to dispose of her separate interest, and if she would [225] have well executed that intention by these instruments, it is very difficult to say, that because the further interests cannot be affected, her own interest shall not be affected, as she intended it should be. It is said, it shall not; because *White* was the trustee to preserve that interest. Suppose he had not dealt in this transaction himself: or suppose, the first estate were expressly to the husband for her separate use, with remainder to *White*

(a) 1 *Bro.* C. C. 16.

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for her separate use: is there any reason to say, she was not at liberty to dispose, to a third person at least, of the separate trust in possession, in some form? If she was, why will not the same principle do for the estate in remainder? Next, supposing a third person would have taken effectually, are *White* and *Quarman* to be held not to have taken the Plaintiff's interest effectually, because *White* happens to be the person dealing in all the circumstances, and upon what terms are they to account upon this bill? The conveyance in 1799 to *Evans*, for 99 years, to secure 200*l* the receipt upon the back being by the husband, though a most informal, inaccurate, instrument, amounts to a plain manifestation under her hand and seal, though a nullity in Law, as the bond in *Hulme* v. *Tenant (a)* was, that she meant to charge her life interest with that sum. In some respects this case is stronger than *Whistler* v. *Newman*, *(b)* for there *Vandenanker* was a mere creditor, and the ground, that he would have a better hope of payment from the husband, the transaction having no direct connexion with his debt, cannot be very clearly supported. In that case the account was not given far back, and it was justly restrained, for the wife might permit the husband to receive the property from time to time, and in that case the Court will only give the account for one year. In this case it must be considered, * whether all this acquiescence is not to be taken as consent, till the bill filed, that her husband or those claiming under him should receive the rents and profits. The doctrine as to a trustee buying the trust property does not apply to such a trustee as *White*: a trustee, not to sell, but to preserve contingent remainders, and to pay the rents and profits to the separate use of the wife. Then the objection of acquiescence occurs. Lord *Alvanley* certainly held, *(a)* and, I think, justly, that long acquiescence under a sale to a trustee, (for that is the principle of his decree,) ought to be taken as evidence, that, as between the trustee and the *cestuy que trust* the relation had been abandoned in the transaction: and, that in all other respects it was fair, for the mere circumstance of the abandonment would not be quite sufficient. my notion resting upon this among other things, that the situation of the trustee gives him an opportunity of knowing the value of the property he is to buy better than the *cestuy que trust*, that he acquires that knowledge at the expense of the *cestuy que trust*, and is bound to apply it for his benefit, and it is so difficult

Wife permitting her husband to receive her separate income, the account shall go back only one year (1)

Ground of the doctrine as to a trustee buying the trust property, and the effect of acquiescence

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(a) 1 *Bro. C. C.* 16. *(b)* *Ante*, vol. iv. 129.

(a) p. 226. *Campbell* v. *Walker*, *ante*, vol. v. 678.

{(1) *Methodist Episcopal Church* v. *Jaques*, 3 Johns. Cha. Rep. 91.}

in most cases to make out by inquiry in a Court of Justice, whether he has acted honestly, that the Court has said, it is better in general cases, that the trustee should not be permitted to buy. 1805. Parkes v. White

It is impossible to decide this case without having the children before the Court, to have these points considered, and I do so much doubt the authority of *Whistler v. Newman*,(o) that I desire, when this cause comes on again, that case may be very fully considered.

The four children of *Parkes* and his wife being brought before the Court, the case was again argued by the same Counsel. For the Defendants *White* and *Quarman*, it was insisted, that whatever may be the right of the children, Defendants, the Plaintiff must go upon her own right to relief, and even if the children had filed the bill, they could not have had redress during the tenancy for life, having only a contingent interest.

The case was argued on behalf of the children by Mr. *Wetherell*.

The Lord CHANCELLOR.—It has been truly observed, that this Plaintiff must obtain in Equity by the strength of her own title the relief, either expressly, or generally, prayed. It is not necessary upon this occasion to consider, whether the children, who are now Defendants, and may hereafter have a right to say, *Quarman* is a trustee for them, would, if they were Plaintiffs, be entitled to relief: the question now being upon the right of this Plaintiff to complain of these circumstances.

Under the limitation, by this settlement, to the wife for life, the husband being entitled in her right during their joint lives, it was admitted, he might demise for that interest, and, therefore, as far as it was parted with for their joint lives, it would be difficult to sustain any complaint. But with an express view to protect the wife, her children, and devisees, there is a limitation, if the legal estate to the Plaintiff for her life should be destroyed by forfeiture or otherwise, vesting directly the legal interest in *White*; and stripping the husband of the right to receive the rents and profits, by declaring, that in that event he should not be entitled to receive them, but, that she [*228] should from that moment be considered as sole, and take them to her separate use. This was the effect, not only of the contract, but also in this Court, that she should have the free power of making a will: that power to re-

(o) *Ante*, vol. iv. 129.

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Husband and wife are purchasers by the marriage for their children.

main in her uncontrolled until her death. According to the true intention, not only the husband was bound not to control that will, but the object of making *White* a trustee was to protect her against the control of her husband, unduly exercised, in that respect. Where an instrument of this sort is executed, the husband and wife are purchasers for the children; the latter particularly, where there is a settlement of her own estate; whether the interests are vested or contingent; such as they are. The mode, adopted in this instance, was by placing in *White* an estate to secure the effect of their purchase for them upon the marriage. It is clear, therefore, there was imposed upon him by this settlement every duty to her, her devisees, and the children; but it is equally clear, that to the extent of the legal and equitable powers the nature of the estate left in her, she could free him from those obligations; and acts, fairly, advisedly, done upon her part, would entitle him to say, he no longer remained under those obligations. He would have been more correct, if he had not joined in the mortgage for 99 years, in 1799: but I do not see, unless that money was his, or some circumstance appears as to the advance of the money, how to quarrel with that; for the husband might by demise have given as good, or a better, security. If however, it should turn out, that he advanced the 200*l.* and the subsequent transactions amount to breach of trust and oppression towards the wife, the fact, that he began then to deal with the estate, is not immaterial with reference to the subsequent circumstances. When the character, in which he stood, is considered, he must not [229] complain, if inquiry as to these acts is pressed to the utmost. The object of the estate in him was to protect the wife against any act by her. I admit, there was a large power in her, according to the authorities, under the trust for her separate use; and the meaning of the contract was, that she should have unreserved a power to make a will, as if she was a *feme sole*.

Admitting for a moment, that she had a clear power of selling the estate to any one, it must appear, that she knew what she was about; especially as the sale is to her own trustee; though not a trustee for sole of her benefit; but he is for her children; and, by this deed, a species of covenantor that he will act accordingly. This instrument recites what is false; that the husband, notwithstanding the subsequent limitations, had power to sell the fee-simple and inheritance. They had no such power, unless the trustee would join; and that wrongful act could not give them the power. She is recited to agree to sell to *Evans*. That is not all; for the deed recites, that she does this with the consent and approbation of her trustee

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and he joins, destroys the uses, to be created by her will, and all the other uses. It is now suggested, that this conveyance, purporting to convey the wife's title, and made under the protection and with the consent of the trustee to *Evans*, is a conveyance to the trustee for his own benefit. The circumstance, that answers all about acquiescence, is the bond of indemnity to *Evans* from the husband against the effect of the acts of *White* himself, who is the purchaser under these circumstances; and then they procure this woman, with whom the husband had contracted, that she should have the free, uncontrolled power to make a will, and *White*, to protect her in the exercise of that power, to make a will in favour of *Evans*, limiting the estate to him, [illegible] and they take a fine. I do not apprehend, that a purchaser [illegible] place under circumstances [illegible] [230] [illegible] that [illegible] That is only a part of the circumstances [illegible] the [illegible] *Evans*, [illegible] following *White* [illegible] *Evans* to himself, [illegible] the owner of the estate [illegible] his own [illegible] that *White* had contracted with him as under a new contract, that *Evans* proposed to convey to him in consideration [illegible], not the sum, but a [illegible] sum of 1000*l.* and there is nothing to enable any person, [illegible] under him, to collect, that there were any circumstances, which in justice and equity ought to be attended to in any purchase from *White*. A few years afterwards *White* sells to *Quarman* the estate, thus acquired by violating every duty to his *cestuy que trust*, for 1500*l.*: an increase of one-third; and with that conveyance *Quarman* takes a bond of indemnity against *Parkes* and his wife, and a covenant against their children, and this Plaintiff then, as if her signing a piece of paper would have any effect, makes a will in favour of *Quarman*, and engages on a piece of paper not to revoke it.

Under such circumstances can there be a doubt, that this Court will at least inquire into all that; and, if it shall turn out, that a sum of money was well advanced, it is to be considered, whether the Plaintiff has now power to make a will, unaffected by her acts and that paper; and whether *Quarman*, having notice, is not a trustee to the uses of her will; and a right to make a will is a present interest. It follows, that the children would have a concurrent right to sue; he is a trustee for the other uses of the settlement, if there is no will. All acquiescence in such a case is nothing; for they have been *de die in diem* bargaining for protection. In the

1805. very last instrument *Quarman* has expressly taken the Plaintiff's engagement not to make a will, because the title was defective. How far it may be possible upon the result of any inquiry to relieve her, as to the estate for the joint lives of her and her husband, may be another consideration, depending upon this, whether, as the husband had power to charge a sum of money upon the rents and profits during the coverture, relief could be given, even if any act was done, destroying the estate during the coverture, upon any other terms than having the estate a pledge for the money so advanced. With reference to another circumstance, I should hesitate long, before I should say, that, where there is a settlement, by which a wife is under contract to have free power to make a will during the whole coverture, this Court would act upon any instrument, the object of which is to put that power under a control, that contradicts the whole effect of the contract upon marriage: an indemnity being taken from the husband against her making that will; the necessary effect of which is to put her mind under a control; a state in which the parties, taking that indemnity, know she ought not to be placed.

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Inquiries were directed as to the sums advanced, the instruments executed, and all the circumstances of these transactions. The cause was again argued upon the Master's report, which did not produce any circumstances that varied the state of it, further than that it appeared by the admission of *White*, that the conveyance to *Joseph Evans* was in trust for *White*; and, that the Master stated the profit upon the sale to *Quarman*, admitted by *White* to be 300*l.* to amount to ... .

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1805.
July 15.

The Lord CHANCELLOR.—The circumstances of this case are very singular; and the conduct of *White* has been in direct contradiction to the purpose, for which he was made a trustee in this marriage settlement, which intended to impose upon him the duty of protecting the wife under all circumstances in which she could be placed. It is true, the estate for life, being a legal estate in her, the husband would be seised of a freehold in her right, and entitled to take the rents and profits. That estate is followed by an estate to *White*, to support contingent remainders, but upon trust to permit her and her assigns to receive the rents and profits for her separate use. Whether the intention was to give her the separate enjoyment of the estate from and immediately after the marriage, or upon any change with reference to forfeiture, I

do not know: but it is clear, until the legal estate in her was determined by some act in her life, the husband was to have in her right the rents and profits. The intention and scheme of the settlement might be, that, if he prevailed upon her to join in a fine, an estate might arise to *White* for her separate use; but that while the husband abstained from such an act, he should have the estate himself. There is difficulty upon that; for a woman, having separate estate for her life, may in this Court sell that interest; and, if the transaction is fair, the fine, by which it is carried into effect, would in Equity be a disposition of her equitable estate also. So that purpose might fail. Under these limitations, it is clear, *White* was a trustee to preserve contingent remainders: next, that he was intended to be a trustee to protect the wife against, not only her husband, but herself; for the object in giving her power to dispose not by deed, but by will, was, that *White* should so manage the legal estate, that [233] to her death she should remain by virtue of his protection in possession of a free and uncontrolled will, enabling her to make a disposition: further, he was to be a trustee for such persons as she should appoint to the succession by that free and uncontrolled will: but, if she should not make an appointment, he was a trustee to protect the future interest of the child, if there should be only one, simply in the character of trustee to preserve contingent remainders; for that limitation to the only child is a contingent remainder: but, if there should be more children, there was a contingent legal estate in him, upon trusts which he was to execute: that legal estate being a contingent remainder in himself, which his estate to preserve contingent remainders enabled him, and made it his duty, to protect. The last limitation to the right heirs of *Catherine Parkes*, as expressed, raises a rational doubt, whether it was not a trust, not a legal estate; and therefore, whether it could be connected with the legal estate, limited to her in the beginning.

The first object was to raise 200*l.* for the husband. Upon the report, I must take *Leans* to be the hand that advanced that sum, not *White* himself. The transaction at that time was not improper; for there was nothing to prevent such a loan, if the wife upon due consideration thought proper, by a pledge of the estate for 99 years, if they should so long live. But that term is gone by the effect of the subsequent conveyances; though it would have been a prudent measure to have kept it alive. The next transaction, upon *White's* affidavit, is, that the husband wished to part with his estate; representing a plan to purchase another estate, nearer, to be settled to the same uses. If that had been the real transaction, and the

1805 consideration fair, some risk might have been incurred as it was a transaction not strictly conformable to the trust: but it could hardly be considered culpable. But

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here is an estate, let at a net rent of 50l. The trustee, with all these duties imposed upon him, buys that estate [*234] at twenty years' purchase. At all events he ought to have given as much consideration, as it was worth. But, (not to lay stress upon that,) suppose 1000l. the full consideration: then White represents, (for the representation must be taken to be his, as well as the husband's,) that these persons had a clear power to sell the whole inheritance, and, to make that good, they levy a fine to Evans, who purchased in May. White being the real purchaser, as appears by the conveyance in August, a fine to be levied to that person, whose duty it was, first, to preserve the contingent remainders to the children, if any; secondly, it certainly was a transaction, contrary to his duty, and particularly to be watched in Equity, to concur in a scheme to take from the wife the power of making a will by calling upon her to make one; and the mode, by which they concert that the children shall never take, is making her devise the estate to the trustee, the purchaser; and calling upon the husband to give a bond of indemnity as to the title; thereby creating, as against the wife, an interest in the husband to use all the marital influence to induce or compel her not to attempt to make that will, the free power of making which was the thing contracted for by the settlement. There can be no doubt, these wills must be delivered up to her, to be disposed of as she thinks fit.

Next, has she an interest in the estate, entitling her to sue as Plaintiff? Whatever may be the judgment, at a future day, of the effect of the fine levied by her, which in my opinion is not governed by *Penne* v. *Peacock*,(a) [235] she has an interest to support this suit: or, as a parent, and a purchaser for her children under the marriage settlement, as all parties to a marriage settlement are purchasers for their issue, she has a right to insist, in that character alone, that the legal estate shall be so dealt with, that the contingent remainders the trustee was bound to protect shall not be left in such peril as they are at present, leaving the effect of her will, in consequence of having joined in the fine to be decided afterwards. It is clear, the purchase by *Evans* in *May* was for *White*. The apparent transaction in *August* following is a distinct purchase from *Evans* by *White*: *Evans* having no connexion with the trustee in the front of the title: the object to give a colour to fence against the

Parties to a marriage settlement are purchasers for their issue.

(a) For. 41.

Plaintiff and her children; and also as to future purchasers. It appears upon the conveyance in 1793, that *White* sold for 1500*l.* the estate he had bought for 1000*l.*; an advance of one-third, the purchaser having distinct notice, and taking a bond of indemnity. *White* for some reason, perhaps not confidently relying upon the transaction, thinking, it might be useful to soften any disposition to dispute it, handed over 200*l.* to *Parkes* and his wife. The advantage made is, according to the admission, 300*l.*, but by the report 500*l.* *Quarman* rests upon his bond of indemnity from his purchase in 1793 until 1799, and then, probably from some intimation that the case of *Penne* v. *Peacock* (*a*) might not do, and, taking the whole transaction together, and attending to *White's* duty, a time might come, when if he should not have a title as devisee of the Plaintiff, he might be considered as having no title, another will is taken from her, devising to *Quarman*, their wants being fed by the advance of 200*l.*

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This estate, therefore, was dealt with by this trustee, from the beginning to the end, in a way directly contrary to his duty as trustee; and I have no hesitation in declaring, that *Quarman* is at this moment seised of the legal estate for such of the uses of this settlement as shall after the death of the wife be good, effectual, and subsisting uses. Next, is he to remain seised, subject to such uses after her death, and to remain a trustee for that purpose? Looking at their title-deed, as disconnected, as it is framed, from the actual title *Evans* had under *White*, first *Quarman* being, as I think he is, a trustee for those uses, is a trustee, claiming directly against those uses: next, their title-deeds are so managed, that if this suit had not been depending, or should not continue, a purchaser from him without notice might perhaps defend himself against the consequence attaching upon the estate. Therefore declare, that *Quarman* holds the legal estate, but subject to such uses, intents, and purposes, as shall legally and effectually subsist under the settlement after the death of the Plaintiff. That will leave full opportunity to contend for the title of her devisees and children, if she should not make a will, and the instruments she has executed as wills must be delivered up to her. Those instruments cannot possibly be held against her during her life. [236]

As to the life estate, the difficulty arises rather out of the peculiarity of the circumstances than from any general doctrine of Law or of this Court, with reference to a conveyance by a *feme covert*, having separate estate. My

1805. PARKER v. WHITE. judgment is, that in this Court a married woman, having an estate to her separate use, is capable of selling it: provided she is *bona fide* dealing with persons, competent to deal with her, and not taking unfair advantages of her. If this Plaintiff, without her husband and trustee, proposed to sell, to a third person, the estate for life she would have to her separate use after the determination of her prior estate for life, she might have made a title in this Court: the transaction being *bona fide*, and no advantage taken. The question then is, whether, under the particular circumstance of the relation of *White* to this Plaintiff, and all the circumstances of the transaction, (for they are all connected with the original transaction) upon a principle, different from the general principle, the sale of the estate, considered as an estate for her life, can or cannot be supported?

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July 18. *The Lord* CHANCELLOR.—I cannot bring myself upon any authority that I have seen, and the principle of which I can approve, to affect the disposition of the Plaintiff's life estate. The true result is, that *Quarman* is to be considered as holding, subject to the life estate, the same estate *White* would now have had, if he had done no act in altering the limitations of the settlement: that is, subject to the life estate, he will have an estate of inheritance in him capable of supporting the uses and trusts limited by the settlement after the death of the wife: the question, how far the fine does or does not affect that power, to be left open, as a question of Law, for that is a pure legal question. The Defendants must pay the costs.

The decree directed, that the two wills made by the Plaintiff, dated the 17th of *May*, 1785, and the 19th of *April*, 1799, should be delivered up to be cancelled; that new trustees should be appointed in the place of *White*, that *Quarman* should convey to such trustees to the use of himself, his heirs and assigns, during the life of the

[238] Plaintiff; and from and after her decease to the use of such trustees, their heirs and assigns, upon such trusts, and for such estates, uses, and purposes, as are declared by the settlement from and after the decease of the Plaintiff, save as to the ultimate reversion, which is to be limited to the use of *Quarman*, his heirs and assigns; and that the next friend of the Plaintiff should pay the costs of the Defendants, the children; and that the Defendants *Quarman* and *White* should pay the Plaintiff's costs, and also the costs paid to the children.

1805

GILBERT v. BOORMAN.

Rolls
July 2

A RESIDUE was bequeathed to the Plaintiff, by name, and "all the other children hereafter to be born," of a child of the testator at their respective ages of twenty-one. The Plaintiff, having attained that age, filed the bill.

Residue bequeathed to A and "all the "other chil-"dren here-"after to be "born" of B "at their re-"spective ages of 21

Mr Romilly, and Mr Bell, for the Plaintiff, noticed the words "hereafter to be born," observing, that these words could not make a difference as to the rule, excluding children born, after one had attained the age of twenty-one, referring to *Andrews v. Partington*,(a) *Prescott v. Long*,(b) and *Whitbread v. Lord St John*.(c)

Those born, after one attains that age, are excluded

Mr Leach, for the Defendant, admitted, upon the authority of the last of these cases, the point could not be maintained.

The Master of the Rolls made the decree, observing, that children born afterwards are excluded of necessity, when a partial distribution is to take place, though, if that circumstance did not prevent it, all would be entitled. In the case before Lord *Rosslyn* it was much discussed.

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(a) 3 Bro. C. C. 401. (b) [illegible] vol. ii. 690.
(c) *Ante*, vol. x. 152. See other references in the note, [illegible]

HILL v. CHAPMAN.

Rolls
August 12

JOHN SHACKMAN, by his will, gave 16,000*l* stock to his executors, upon trust to transfer to the Plaintiffs, his grandchildren, in different proportions: to be transferred to the sons at the age of twenty-three, and to the daughters at twenty-one. A petition was presented by *Frederick Hill*, one of the grandchildren, who had attained the age of twenty-three, stating his situation, as an officer in a regiment going upon foreign service, and praying a transfer of his share to his uncle and late guardian *John Hill*; to be applied and disposed of as the petitioner should direct, who had executed a power of attorney to *John Hill*.

Legacy of stock at a particular age. Order upon the petition of one legatee, having attained the age, for a transfer of his share to his attorney

The Master of the Rolls desired to be informed, whether it was usual to direct a transfer to the attorney of the party.

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Mr. Hart, in support of the Petition, said, there had been instances; and mentioned *Bird* v. *Le Fevre*; in which case Lord *Alvanley* made an order for a transfer to the attorney of one of the legatees, having attained the age specified, going abroad, and apprehending, the money would be wanted for his affairs before his return.

The Master of the Rolls then made the order.

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ROLLS
August 2

CLARKE v. TURTON.

Depositions to a fact, not put in issue, not permitted to be read (1)

Whether the attestation of the Vice-Consul abroad, apparently in his public character, can be considered as the signature of a subscribing witness within the Statute of Frauds to a will, devising real estate, *Query.*

UPON a bill by a devisee against the heir at law, an objection was taken by the Defendant, that the Plaintiff was proved to be an alien papist.

Mr. Richards, Mr. Romilly, and Mr. Daniel, for the Plaintiff, answered, that the point, upon which the objection was taken, was not in issue.

Mr. Fonblanque, and Sir Thomas Turton, for the Defendant, insisted, that the Court must take notice of the fact, whether found in the deposition, or the pleadings: and will not assist the Plaintiff to recover possession from the heir: that an alien enemy and an alien papist are, as to incapacity to take, in the same situation: that the late Acts of Parliament profess to be for the relief of *British* subjects, and were not intended in favour of foreign papists. They cited *Bevan* v. *Dike* (*a*) *Strode* v. *Strode* (*b*) *Balch* v. *Tucker* (*c*)

The Master of the Rolls, as the fact was not in issue, would not permit the depositions to be read.

Another objection was taken to the execution of the will, that the third signature was that of the Vice-Consul: the will being executed abroad, and the attestation of some such public officer is considered necessary to the validity of the act, that the attestation in this instance was a memorandum by the Vice-Consul, to operate as a certificate, a separate act, in his public character, and sealed with his official seal, and therefore it could not be said he subscribed as a witness.

The question upon that objection was sent to Law

(*a*) 2 Ch Cas (*b*) 2 Ch Cas 196. (*c*) 2 Ch Cas 40

{(1) *James* v. *M'Kernon*, 6 Johns Rep 56[illegible] }

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THE ATTORNEY-GENERAL v. WHITELEY.

July 20, 22.

BY the decree, pronounced in this cause, an inquiry was directed, among other things, what estates were derived under the respective donations to the Charity; what salaries were paid to the master and usher of the free grammar school of *Leeds*; how many boys there then were in the school, and from time to time had been for the last five years; whether it would be proper to make any and what additional salary to such master or usher in future; and whether it would be proper and for the benefit of the Charity to have any other master or masters to teach writing, arithmetic, and other languages besides the Greek and Latin; and it was ordered, that the Master should consider of a proper scheme for carrying the Charity into execution.

The Master's report stated the first donation, by the will of *William Sheafield*, dated the 6th of *July*, 1552, declaring as to several copyhold premises, which were surrendered to the use of his will, that the feoffees, and their heirs, should stand seised to the use and for finding sustentation and living, of one honest, substantial, learned man, to be a schoolmaster, to teach and instruct freely for ever all such young scholars, youths, and children, as should come and resort to him from time to time, to be taught, instructed, and informed in such a school-house, as should be found, erected, and built, by the parishioners of the town and parish of *Leeds*, upon condition, that, if the parishioners should not found, &c. a school-house, and also purchase unto the schoolmaster for the time being, a sufficient living of other lands, together [*] with his gift, to the clear yearly value of 10*l*. for ever, within four years after the testator's decease, then the feoffees should stand seised to the use of the poor inhabitants of *Leeds*. He directed, that his feoffees and their heirs for ever should have the nomination, election, and appointment, of the said schoolmaster, and gave them power to put him out for reasonable cause, at their discretion.

The report also stated a surrender of copyhold premises on the 13th of *May*, in the second year of *Philip* and *Mary*, by *Richard Bank* and his wife, to the use, behoof, and sustentation, of the free grammar school in *Leeds* for ever: a feoffment by Sir *William Armystead* in the same reign, with a declaration, that the feoffees should bestow and employ the issues and profits towards the finding of one priest sufficiently learned to teach a free grammar school within the town of *Leeds* for ever, for all such as should repair thereto, without taking any money more or

In a Charity case, an omission in the original decree, not declaring the nature of the Charity, corrected upon further directions, without rehearing.

The income of a Charity can be changed by an application to objects different from those intended by the founder, only, where it is clear, that by a strict adherence to the plan his general object will be destroyed, not upon the notion of advantage to the inhabitants of the place.

Therefore the foundation, being a free grammar school at *Leeds*, for teaching grammatically the learned languages, the Court refused to permit the application of part of the funds to procure masters for *French*, *German*, and to other establishments with a view to commerce.

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less for teaching of the said children or scholars, saving of one penny of every scholar to enter his name in the master's book, if the scholar have a penny; and, if not to enter and continue freely without any paying: and a surrender of copyhold premises by *John Moore* and others, in the thirty-seventh year of Queen *Elizabeth*, to the use and behoof, and for the support and maintenance, of a free grammar school in *Leeds* for ever.

The report further stated, that by an inquisition, seventeenth *James* I it was found, that *Lawrence Lawson* surrendered copyhold premises to the sustentation, reparation, and free use, of the grammar school of *Leeds*, and other premises, to the use, sustentation, maintenance, reparation, and governance, as well of the free grammar school of *Leeds*, as of a master, usher, and scholars of the said school, for ever: that certain persons took of
[243] Queen *Elizabeth* other premises to the use of the school and the King's highways in *Leeds*, but that the rents are solely applied to the use of the free school in *Leeds*: that *William Robinson* surrendered other premises, for and towards the keeping and maintaining of the free grammar school of *Leeds* aforesaid, and that all the last-mentioned premises were purchased with money belonging to the free grammar school of *Leeds*. By another inquisition, thirteenth *Charles* II it was found, that other lands were devised towards the maintenance of the free school of *Leeds*; and it appeared, that Sir *Thomas Sheffield* devised and bequeathed several houses, the rent whereof was to go to the maintenance of the free school of *Leeds*: that *John Harrison* by his will in 1653 directed as to a house, then used as a grammar school, that it should be for a master and usher to teach scholars in for ever.

The Master then certified, that it did not appear to him, that there was any substantial difference between the uses of the several donations, but they are all meant to be applicable for the benefit of the grammar school in *Leeds*, originating under the will of Sir *William Sheafield*. He further stated, that it appeared to him by the affidavit of the relators, members of the committee for the management of the funds of the free grammar school in question, that the tuition of the scholars was confined to the Greek and Latin tongues solely, and did not extend to any other branch of education whatever; and particularly, that the teaching of writing and arithmetic, or of the French and other living languages, formed no part of the present system of the school: that the town of *Leeds* and its neighbourhood had of late years increased very much in trade and population, as well in respect of its inland trade which was very considerable, as of a very extensive
[244] foreign trade, carried on in a direct manner to most part

of *Europe*, independently of and without the intervention of the merchants or markets of *London*; and therefore the learning of French and other modern living languages was become a matter of great utility to the merchants of *Leeds*, and to such of the inhabitants as were concerned in the trade thereof; and the teaching of such living languages was become a proper and very useful part of the education of youths intended for trade: that for the reasons aforesaid, and other reasons, arising out of the circumstances and situation of the town of *Leeds* and the inhabitants thereof, the plan of education, then practised in the said grammar school, was in the judgment of the deponents become inefficient for the purpose of giving the necessary and most suitable qualifications to the rising generation of that town and its neighbourhood; and it would be proper and for the benefit of the Charity to have masters appointed to teach writing and arithmetic, and the French and German, and such other living languages, as were usually considered to form the basis of a mercantile or commercial education; and that such an extended plan of education in the school would be very useful to the inhabitants of the town of *Leeds*, and would be the means of greatly increasing the number of scholars, which had much decreased notwithstanding the extended trade and increased population of the town: and, after a sufficient maintenance was provided for the Defendants, the master and usher, there would be a surplus arising from the funds of the Charity, which might be usefully applied in salaries of such additional masters as might be employed in the extended plan of education above suggested.

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The Master further certified, that a salary of 120*l.* a-year is paid to the master, and a gratuity of about 7[illegible]*l.* at *Christmas*, and a salary of 63*l.* a-year to the usher, and a gratuity of 42*l.*; that at the date of the decree, the 11th of *December*, 1797, there were forty-one boys in the school, and there had been for the preceding five years about forty-four; and it appearing, that there is nothing in the original institution and endowment of this Charity, which necessarily excludes the teaching of any useful kind of learning, and that from the present situation and circumstances of the town of *Leeds*, (for the benefit whereof the Charity was instituted,) it will be very beneficial to the inhabitants to employ part of the funds towards teaching those things, which may be useful in trade and commerce, he approved of adding to the present establishment one German master and one French master, to teach those languages, and a master for teaching algebra and the mathematics: but it appearing to him, that there are a variety of schools in *Leeds* already for

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teaching writing and arithmetic, where boys may be instructed at a very small expense in those branches of education, and that a greater proportion of prejudice may arise to such seminaries, than of benefit to the inhabitants of the town of *Leeds*, to have writing and arithmetic free of expense, he therefore approved only of those three additional masters; to be elected in like manner as the master and usher from time to time have been. The report further stated, that, as it was uncertain what number of scholars there may be upon this plan, the Master gave no opinion upon the propriety of any additional salary to the master and usher, and for the same reason it should be left open to the relators and their successors to give reasonable stipends to the additional masters from time to time, and to vary the salaries of the present master and usher from time to time, according to the increase and decrease of the scholars.

An exception was taken to this report by the Defendant, the master, on the ground, that the school was intended for a free grammar school only, not for algebra, [246] the mathematics, or the modern languages; that it does not appear, the persons, who endowed the school, intended, that more than one master and one usher should be appointed and endowed; and therefore no more ought to be appointed, especially as no complaint is made, that they are not sufficient to instruct the number of boys, who attended or wish to attend a free grammar school in *Leeds*; and, as the estates belonging to the school are chiefly copyhold, a considerable part of the rents must be set apart to pay fines and for repairs, and the residue will not constitute unreasonable salaries for two men of learning; who are to derive no other benefit from the school than their salaries: that the utility of teaching the French and German languages in future must depend upon accident and political and commercial circumstances, and therefore is not proper to be made a permanent part of an institution like the present; and in case the master and usher are not entitled to the whole of the rents and profits, after setting apart sufficient for the fines, &c. their salaries ought to be augmented; and they ought not to be left to the discretion of the committee; but specific directions should be given upon that head.

Mr. Richards, and Mr. Bell, in support of the Exception, contended, that this was the first attempt to divert a Charitable Foundation from its original design; and, that it is of the utmost importance to keep up foundations of this nature, and to secure to the master a respectable situation.

The Attorney-General, and Mr. Martin, for the Report

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The Lord CHANCELLOR.—This case appears under singular circumstances. The object of the information is to convert this old * school into a commercial academy, and the Court, instead of declaring by the decree the nature of the Charity, has sent that to the Master, who has decided that question. That creates a difficulty of form. Strictly the cause ought to be re-heard, and the Court ought to declare, what is the Charity. But in a Charity case I may do that now. Upon the principle, that, the information praying wrong relief, the Court will, as it ought, give such relief as will do justice to the Defendants, I may in a Charity case take so much liberty with the record as now to examine and declare what is the Charity, and proceed upon that (a). [*247]

In a Charity case, though the information pray wrong relief, the Court will give proper relief.

The question then is, whether the Court had any power to do this: what right the Court had to alter the establishment of the Charity by the instruments of foundation. Without going the length of saying, the Court has no such right, that a case should arise, in which the application of the whole fund would destroy the charitable purpose, in order to preserve that purpose, yet upon all the authorities, to warrant the Court in assuming that power, the case must be very clear, and the alteration of the nature of a Charity is a proposition as serious as can be offered to the judgment of the Court. The question is, not what are the qualifications most suitable to the rising generation of the place, where the charitable foundation subsists, but, what are the qualifications intended. If upon the instruments of donation the Charity intended was for the purpose of carrying on free teaching in what is called a free grammar school, I am not aware, nor can I recollect from any case, what authority this Court has to say, the conversion of that institution, by filling a school, intended for that mode of education, with scholars, learning the German and French languages, mathematics, and any thing except Greek and Latin, is within the power of this Court. The proposition is quite different, where the directions prayed are founded in a purpose to promote the direct object of the Charity; and, where boys are to go to this school, who are not to learn Greek and Latin, but are to have a particular part of the school set apart, and the funds applied for a different purpose from that intended by the donors; which, may be very useful to the rising generation of *Leeds*, but cannot possibly be represented as useful to this Charity. The difficulty is insuperable. [*248]

As to the salary, and the gratuity in addition to it, the

(a) Attorney-General v. Parker, Attorney-General v. Smart, Attorney-General v. Scott, 1 Ves. 43. 72. 413.

1805. actual dealing with the funds belonging to this Charity has hitherto been upon a principle, which I do not say is

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incorrect: that is, supposing a competent master may be found to teach for this salary, that it is within the power of the trustees, if he conducts himself well in the execution of his duty, to give him a gratuity almost as large as the certain salary. It is much more consistent with the principles of this Court from time to time to reward the master out of the fund, and very largely, perhaps in proportion to the number of years he has held the office, or to the number of boys, than to apply any part of the fund to a purpose the donors did not look to. As to the usher, some of the instruments expressly found an usher. It is more agreeable to principle, to increase the emoluments of both the master and usher, for carrying on the purpose of the foundation, than to bring in masters, to whom the object of it does not point.

At the date of the decree the number of the boys at this school was forty-nine; and for some time previous had been forty-four; and it is supposed, that for that reason this Court is at liberty to lay down a permanent plan for education in other studies, not the learned languages.
[249] Experience justifies the observation, that, where there is a school with a large establishment, and the scholars go to it *gratis*, there is a strong temptation not to struggle to obtain many scholars; and therefore the amount of the salary sometimes defeats the purpose. But does that give the Court power to apply the revenue of the foundation to other purposes than those, to which the author of the Charity has devoted it, and, acting upon the ground, that at present the number of scholars is not as great as was intended by the founder, vary the nature of the establishment, at the hazard of preventing hereafter, under another master, an increase to the number that was intended? Much less is that right, if there can be such a management of the fund, consistent with the object of the foundation, as can provide for the due execution of the master's duty, always securing to him a respectable, independent, situation, and as to the excess giving him a little beyond what will secure that respectable, independent, situation, he ought to have.

The report states, that there is nothing in the nature of this foundation, that excludes an application of the fund to any kind of useful learning; and that it will be very beneficial to the inhabitants of *Leeds* to add masters to teach the German and French languages, algebra, and mathematics, excepting expressly writing and arithmetic, as there are other seminaries in the town to which such an establishment will be prejudicial. Upon what principle does the Master set off the prejudice those other semi-

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rantes would sustain against the benefit to the inhabitants of *Leeds*? If according to the plan every boy to be brought to the school was to be taught the learned languages, and the circumstance, that these other sciences were to be taught, would induce persons to send boys to the school to learn Greek and Latin also, that purpose might have a tendency to promote the object of the foundation. But, if these plans are to be distinct, the institution will be singular; hazarding the destruction of all utility whatsoever. This is a scheme to promote the benefit of the merchants of *Leeds*. It is not, that the poor inhabitants are to be taught reading and writing English; but the clerks and riders of the merchants are to be taught French and German, to enable them to carry on trade. I fear, the effect would be to turn out the poor Latin and Greek scholars altogether. To make this school, as a Greek and Latin school, useful, you must have there what the authors of the Charity express, a learned man, capable by his life and doctrine of giving the most useful information. If persons, inclined to place themselves in that situation, are told, their emoluments are to depend upon the number of scholars in a school, to be founded upon the principle, that it is not for the benefit of the inhabitants of the town to learn Latin and Greek, you propose terms most calculated to repel candidates; for, connecting the increase and decrease of emolument with the actual decrease of the scholars, who are to learn Latin and Greek, the necessary effect of this plan must be such, that very little hope can remain to the master and usher of an increase of their salaries. I doubt, therefore, whether the plan, which the Master has adopted, is the most useful: if the principle can be represented as resulting from all these instruments. [250]

Taking upon me now to correct the omission of this decree, and to declare, what this foundation is, I am of opinion, upon the evidence now before me, that the free school in *Leeds* is a free grammar school, for teaching grammatically the learned languages, according to Dr. *Johnson's* definition; upon circumstances, without variation in fact since the year 1553, to which I cling, as better interpreters of the real nature of the Charity than any criticism I can form, or construction upon the instruments; for, with the exception of the highway, the original founder proposed to the inhabitants the benefit of this donation by his will for a free school. It appears, that there has been a free school in *Leeds*; and to this time every Charity, given by these instruments, has been by inquisitions and decrees upon them applied in fact for the benefit of the free school in *Leeds*; in which nothing has been taught but the learned languages; and under [251]

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such facts the result of the evidence is, that the free school in *Leeds* is a free grammar school for teaching grammatically the learned languages. The reason of my opinion is, that I do not apprehend, it is competent to this Court, as long as it can find any means of applying the charitable fund to the Charity, as created by the founder upon any general notion, that any other application would be more beneficial to the inhabitants of the place, to change the nature of the Charity. A case may arise, in which the will cannot be obeyed: but then the fund will not go to the heir, upon the principle, that an application is to be made, as near as may be (a), growing out of another principle, that you are to apply it to the object intended, if you can. It must therefore appear by the Master's report, that the Court must despair of attaining that object, or the Court cannot enter into the question, in what other way the fund is to be applied.

Principle of *cy pres*, as applied to a Charity, where the precise object [cannot] be attain[ed].

Declare, that the Charity intended to be established by the first donation, mentioned in the Master's report, is the sustentation and maintenance of a free grammar school for the teaching the learned languages: that the free school in *Leeds* is a free grammar school for the teaching

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grammatically the learned languages, and that it appears to the Court, that the free teaching thereof is the Charity intended to be established by the several donations, mentioned in the report, so far as the same relate to the school. With that declaration let the Master review his report as to any plan they may think proper to lay before him; and it will be open to him to consider, what is proper and necessary, not for the benefit of the inhabitants of *Leeds*, but for the benefit of the Charity, declared to be such upon this record. I send it to the Master in that large way, for, though it is determined, that the Charity is a Charity for the purpose of teaching the learned languages, yet it is open to consideration, what arrangement as to the management, and the salaries and gratuities to the masters, may upon the whole be proper for promoting that Charity. But it goes much further, for it is right to make that declaration in the decree.

(a) *The Bishop of Hereford* v. *Adams*, ante, vol. [illegible]

1805.

LORD SHIPBROOK v. LORD HINCHINBROOK.

Jan. 18.

UNDER a decree, directing an account of the personal estate of *Anna Maria Lumm*, who died in *January*, 1797, the Master's report charged all the executors with the sum of 1200*l.* 3 *per cent.* Reduced Bank Annuities, and interest, and one of them separately with 2819*l.* . . 10*d.* received by him on account of the personal estate.

Executors charged for negligence by joining in a transfer to a co-executor on his representation, that it was required for debts, but not doing so for debts; making no inquiry as to the application for that purpose; though he possessed other funds, part of the assets, not through them which funds he wasted.

The Defendants, Lord *Sandwich*, Sir *George Osborn*, and *John Osborn*, three of the executors, took exceptions to the report, for charging them with the 1200*l.* Reduced Annuities, and the interest, alleging, in their discharge, that in *July*, 1779, they joined in executing a power of attorney to the fourth executor for the sale of that stock, upon his request and representation, that it was required for the purpose of paying debts; which stock he sold on the 30th of *July* for 772*l.* 10*s.* He was permitted to manage the affairs of the estate; and at the time of the sale had in his hands the balance, with which he was charged separately.

Mr. Romilly, and *Mr. Hollist*, in support of the *Exceptions*, contended, that the other executors could not be charged, under the circumstances of this case; which might be compared to *Bacon* v. *Bacon*, (*a*) and did not resemble *Chambers* v. *Minchin*. (*b*)

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The Attorney-General, *Mr. Piggott*, *Mr. Alexander*, and *Mr. Hart*, *for the Master's Report*, insisted, that these executors ought to be charged on the ground of gross negligence. In *Bacon* v. *Bacon* the circumstances were sufficient to protect the executor, who trusted the person employed by the testator himself.

The Lord CHANCELLOR.—If this case could be put thus, that at the time this executor made the application to the other three executors there were no debts due, and the application was therefore founded in falsehood, meeting too easy credit from them, making no attentive inquiry, but reposing entirely upon their co-executor, who by those means got the produce of the stock into his hands, and applied it to his own use, it would be impossible to contend, that they would not be chargeable with him. This happens to be a fund, over which executors have no more control individually than trustees have over a trust fund. The principle therefore is the same as that, which governs the case of trustees. But an executor, having a fund,

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(*a*) *Ante*, vol. v. 331.
(*b*) *Ante*, vol. vii. 186. *French* v. *Hobson*, *ante*, vol. ix. 103.

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To discharge a co-executor the act must be necessary for the purposes of the will, and he must use reasonable diligence in inquiring into the truth of the representation.

standing in the joint names of himself and another, cannot upon the mere representation of the co-executor, if false, be justified in doing an act, that is an exercise of power over that fund. First, the act must be necessary for the purposes of the will: and the person, to whom the representation is made, has imposed upon him, at least ordinary and reasonable diligence to inquire, whether the representation is true. So far the principle may be safely laid down.

Also, if an executor had been dealing with the assets a considerable time, much beyond that period, in which according to the ordinary course the debts would be paid, and he applies to the other executor to have this fund put into his hands exclusively, and the other does inquire, and satisfies himself, that there are debts unpaid, and the real purpose of the executor, making the application, was to apply the fund to the discharge of debts; if it turned out afterwards, that he had in his own hands a fund, sufficient for the payment of those debts, and therefore the application of the other fund to that purpose was unnecessary, and that fund was not in fact devoted to the purpose, for which it was provided, it would be impossible for the executor, who parted with it, to discharge himself. He would be subject to the imputation of negligence, as having been too easy with his co-executor; too remiss in not asking, how he had been dealing with the assets in his hands, two years and a half in this instance.

But there is another case, going beyond that; and upon which I am not sure there would be a principle for [255] charging the executor. Suppose one executor, the others not intermeddling or interposing for two years and a half, had got funds in his hands, which he ought to have applied to the debts; that he had not done so; and was in such circumstances, that he had not funds to discharge the debts he ought to pay in respect of what he had so received. It would be imprudent, I agree, for the others to place other funds, liable to debts, in the hands of a man, who had not applied those funds he already had: but, suppose they did so, and he actually applied those funds, so placed with him: would they in that case be liable: the other funds having got into his hands without their interposition; no means they could adopt capable of getting those funds out of his hands; recollecting also, that no answer could be given to the creditors by either of them: could it be said, the other executors should be answerable, not with reference to the debts looked to, when trusting their co-executor, but for assets, with which they had not trusted him; but which he had by his own act got into his hands, and wasted?

The facts of this case, which, though properly pressed against these executors, must not go to the extent of shutting out further inquiry, as they now stand, are these. This executor having in his hands a large sum of money, due to the estate, which, if it may be recovered, has not been yet recovered, this other fund was put into his hands for the payment of debts, and a considerable part was applied for that purpose. The question then is, how far the other executors are liable in respect of a sum of money, not received from them, which he is not in circumstances to answer; whether the fact, that they have applied another fund through the medium of that person to the discharge of debts, which that fund was liable to pay, will make them more liable, than if they had made that application through any other person. There is very considerable reason for thinking, the other executors could not be charged to the extent of the sum of money he did actually apply to those debts, then unpaid, merely upon the ground, that he had, not in conjunction with them, received other money, which he had not applied, but for which he remains answerable. From so much therefore as was applied in discharge of those debts the co-executors would be freed, if it can be ascertained, what sum of money was so applied. If that cannot be ascertained, it must be taken, as if none of it had been so applied. A very unlimited and undeserved confidence was placed by them in this co-executor. But the difficulty I have is this: whether it is possible to hold, that, because he had in his hands a sum of money applicable to debts, and they let him get this fund, also liable, if this sum, or part of it, has been duly applied to the debts, and that part can be duly ascertained, these executors can be fixed, to the extent, in which they have paid debts, to which this fund was liable, by the circumstance, that their co-executor happened to have in his hands another fund, applicable to the debts, which fund he wasted. At the utmost you could only contend, (and whether that would do I do not determine,) to this extent, that you could prove, that these executors, by applying the fund they had to the debts, have actively, not merely passively, lost the fund they never did jointly possess, but which had been possessed solely by the other executor, and for which he alone is answerable. It is said, only a part of the money was so applied. That must be ascertained, and, if it cannot be ascertained, the consequence is, the executors must be charged, and the exceptions overruled.(a)

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An inquiry was directed, whether the specific money, received by the co-executor, was applied in discharge of any, and what, debts. [257]

(a) *Langford* v. *Gascoyne*, post, {p. 333}.

1805.

July 15, 16, 18, 19.

WARE *v.* POLHILL.

Leasehold estates bequeathed in trust to pay the rents and profits to the persons for the time being entitled under the limitations of real estate devised in strict settlement with power to the trustees, at any time with consent of the persons so entitled, or, if minors, at their own discretion, to sell, and invest the produce in real estate to the same uses.

The leasehold estates vest absolutely in the tenant in tail upon his birth, and the power is void.

Application of the personal estate of infant tenant in tail to the redemption of the land-tax by persons, not having authority within the Act. Equity, by analogy to the option, to be reserved by guardians, &c. under the Act, for the personal representative of the infant to charge the estate in the possession of the remainder men

NATHANIEL POLHILL, by his will, dated the 14th of *June*, 1782, devised all his freehold and copyhold estates to his eldest son *Nathaniel Polhill*, for and during the term of his life without impeachment of waste, remainder to trustees to preserve contingent remainders; remainder to the first son of the body of his said son *Nathaniel Polhill* lawfully begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the 2d, 3d, 4th, 5th, and all and every other the son and sons of his said son *Nathaniel*, successively, and the respective heirs male of the body and bodies of all and every of such son and sons; and, in default of such issue, to the devisor's second son *John Polhill* for life, with remainders to trustees to preserve contingent remainders, and to his first and other sons in tail male, in the same manner; with similar remainders to the devisor's other sons and [illegible] male; remainder to his daughter *Mary Polhill* and her heirs.

The testator then gave to *Benjamin Way* and *Robert Maitland*, their executors, &c. all his leasehold estates *[258] whatsoever and wheresoever; upon trust from time to time, after payment out of the rents and profits of the rents reserved, and the fines, which may from time to time become payable upon the renewal of the said leases, to pay the remainder of the said rents and profits of the said leasehold estates unto the person or persons, who under the limitations hereinbefore contained shall for the time being be entitled to the rents and profits of his beforementioned freehold and copyhold estates; and to and for no other use, trust, intent, or purpose, whatsoever; and he thereby empowered the said *Benjamin Way* and *Robert Maitland*, their executors, &c. at any time hereafter, with the consent and approbation of the person or persons, who shall, as aforesaid, for the time being be entitled to the rents and profits of his said freehold and copyhold estates, signified by writing under his or their hand or hands, and attested by two or more credible witnesses, or, in case such person or persons shall be a minor or minors, then at the discretion of his said trustees, to sell and dispose of all his said leasehold estates, or any part thereof, and to lay out and invest the money, arising by such sale or sales, in the purchase of freehold or copyhold messuages, lands, tenements or hereditaments, in *England*: the same, when purchased, to be conveyed, surrendered, settled, and assured, according to the different natures of freehold and copyhold estates, to

for, and upon, the same uses, trusts, intents, and purposes, in all respects, as the testator had before given and subjected his freehold and copyhold estates, and, until such purchase shall be made, to lay out with such consent, or at their own discretion, as aforesaid, the money, arising by such sale in real or government securities, and from time to time to pay the interest and dividends to the person or persons, who shall as aforesaid, for the time being be entitled to the rents and profits of the beforementioned freehold, copyhold, and leasehold, estates, with powers to the persons in possession of the freehold and copyhold estates of leasing, and power to *Way* and *Maitland*, their executors, &c. with the consent of the person or persons entitled to the rents and profits of the leasehold estates, or, in case such person or persons shall be minors, at their own discretion, to demise the leasehold estates, not exceeding twenty one years. The testator gave to his second son *John* a legacy of 7000*l*. and to his younger sons *Edward* and *Robert*, and his daughter, 10,000*l*. each, payable at the age of twenty one; and, if either legatee should die under that age, that legacy to fall into the residue, with direction for maintenance out of the interest of their respective legacies, and accumulation of the surplus interest for each child; and a declaration, that the reason for not giving the eldest son a money legacy was the provision made upon his marriage, and the further provision for him by the will. Then, after legacies to *Way* and *Maitland* of 200*l*. each for their trouble, the testator gave all the residue of his personal estate to be laid out in freehold or copyhold estates, to be conveyed to the same uses, &c., with a direction that the interest in the mean time should go as the rents and profits.

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The testator died on the 30th of *August*, 1782. *Nathaniel Polhill*, the eldest son, died in the same year, on the 30th of *November*, leaving *Nathaniel*, an only child, an infant of the age of sixteen months, who died in 1802, at the age of twenty years and ten months, without issue. The bill was filed by his mother and administratrix, and her second husband, against *John Polhill*, the second son of the testator, and his eldest son, and the trustees *Way* and *Maitland*, praying, that the Defendants *Way* and *Maitland* may be declared trustees of a college lease, renewed by them in *October*, 1782, and of all other the leasehold property of the testator, for the benefit of the estate of *Nathaniel Polhill*, the infant, deceased; and may assign to the Plaintiff *Ursula Ware*, as his administratrix, and account accordingly; and that an account may be taken of the several sums of stock transferred from the personal estate of the said infant, either in his life, or [*260]

1805. after his death, in satisfaction of four several contracts for the redemption of the land-tax on the devised premises, and of the dividends, which would from time to time have accrued due on the said several sums of stock, if the same had not been transferred, and that the value of the said several sums of stock, and the amount of the dividends, may be paid to the Plaintiff, or, that, as administratrix, she may be declared entitled to a perpetual rent-charge upon the said devised estate, on which the said land-tax has been so redeemed, to the amount of such land-tax, to be paid from the death of the infant.

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The Master's report, under the decree, made in July, 1804, stated several contracts by the tenants, trustees and guardians to the infant, in 1799, under the Acts (a) for making perpetual, subject [illegible] purchase of the land-tax [illegible] option of the land-tax, charged upon the devised [illegible] and that there was not any option declared [illegible] such contracts. Some transfers of stock by the [illegible] into the names of the Commissioners for the [illegible] of the national debt, in discharge of s[illegible] that had become due under the contracts were made before the death of the infant. Other transfers were made in May and July, 1802, in discharge of the remaining instalments, which became due after his death. All the payments were made out of the [illegible] of the infant, not at

[261] the request of any person, but under the idea, that, as the instalments became due, they were to be paid out of the infant's property, and to be repaid by the parties, who became entitled to the estates on the death of the infant.

The report further stated, the testator's interest under a renewed lease, dated the [illegible] of October, 1781, from the College of All Souls, Oxford, in a moiety of certain premises for twenty years, which lease was renewed to Richard Carter, originally the joint lessee with the testator, and to Maitland and Way, upon the 22d of November, 1788, and again to the same parties upon the 19th of December, 1795, for twenty years. The Master also stated a lease, dated the 28th of February, 1782, to the testator for ninety-nine years, if the lessor should so long live. That lease determined since the death of the infant by the death of the lessor. The testator also died possessed of other leasehold premises, which after his death were sold by the Defendants Maitland and Way, and part of the money produced by the sale was paid to the executor, to be applied in payment of debts, &c. and the re-

(a) Stat. 38 Geo. III. c. 60. 39 Geo. III. chaps. 6. 21. 40. 43. 108. Stat. 39 & 40 Geo. III. c. 30. Stat. 41 Geo. III. c. 72, consolidated and amended by Stat. 42 Geo. III. c. 116.

sidue invested in the funds in the names of *Maitland* and *Way* upon the trusts of the will. The renewed leases from the College of *All Souls* were not obtained by *Maitland* and *Way* at the request of any person. The fines were paid out of money belonging to the infant *Nathaniel Polhill*. After the death of the infant another renewal took place. By indenture, dated the 2d of October, 1802, as to the testator's money to *Maitland* and *Way*, [illegible] them to be trustees for *Jane Polhill*, which renewal was obtained at the request of [illegible], and at his expense. 1805 Way v. Polhill.

The [illegible] 262

[illegible] that the intention of the testator [illegible] should, after payment [illegible] estate, and [illegible] ought to [illegible] that the intention [illegible], and, that the leasehold [illegible] should go with the freehold [illegible] Equity would permit [illegible] was not to be transmissible [illegible] attained the age of twenty-one.

Mr. [illegible] and *Mr. Cowmbers, for the* [illegible]. [illegible] will contend, that the leasehold estate [illegible] first tenant in tail absolutely, [illegible] attained the age of twenty-one. In [illegible] expression of an intention, that [illegible] should be continued together, as [illegible] nothing to show, the testator did not mean the [illegible] to have its legal effect. The point can only be put upon the power of the trustees to sell the leasehold estate, and invest the money in freehold estate. By executing that power they might have prevented the estate vesting; but, as they have not exercised it, the estate vested absolutely. There is no necessary implication from that power; and the effect of the limitation is, to give from time to time the same measure of interest in the leasehold estate as in the freehold.

2dly. As to the redemption of the land-tax, these persons were in the situation of total strangers to the estate; taking upon themselves without authority to act as guardians and trustees for the infant. The acts for the redemption of the land-tax enable persons, having themselves the interest in the estate, to declare their option to [263

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the time they enter into the contract.(a) If these persons had been guardians, they might have entered into the contracts. but their duty would have required them to reserve an option, contracting for the infant tenant in tail, as he might die before he could acquire the absolute interest. Though the thirty-seventh section (b) speaks of persons not entitled to any estate of inheritance, yet from the other clauses it appears, the estate of a tenant in tail was not expressly provided for. The circumstance, that there might be an estate of inheritance, not a fee-simple, was not adverted to. A Court of Equity would upon the ground of mistake say, the remainder-man should take no benefit by it: will consider that as done, which ought to have been done, by persons acting on the part of an infant, and will therefore consider this case, as if an option had been declared, and the infant was therefore entitled to a rent charge upon the estate; and, if not, that he was entitled to be repaid by those persons, who took upon themselves to act as trustees, the property misapplied by them in redeeming for the benefit of other persons, not for the infant.

Mr. Alexander, and Mr. Kenyon, for the Defendants, the Trustees.—The suggestion is, that these trustees acted innocently, and by mistake. But clearly in some way this is a charge upon the estate; and the Court will protect

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the trustees by charging the estate in the hands of the remainder-man. The contract was made with the trustees. They were not seised of, or entitled to, any estate of inheritance. They are therefore expressly within the terms of the thirty-seventh clause of the act,(a) and also within the equity and meaning, and therefore entitled to the benefit of it. In the subsequent act (b) the same relief is given to the purchasers under a different description: that of persons seised of an estate in remainder, which they had, though only as trustees to support contingent remainders. If the trustees had no interest, it was not competent to the Commissioners to contract, for under these acts, when the contracts were made, the time of preference had not expired. In the ordinary case of the application of an infant's personal estate to the benefit of his real estate the Court will make a charge upon equitable principles. Though a charge paid off by tenant in tail is evidence of his intention to discharge the estate, there can be no doubt, if he was an infant, this Court would keep that charge alive for his benefit. Another ground against this claim is, that there is no equity for the re-

(a) Stat. 38 Geo. III. c. 60. s. 17. (b) Stat. 38 Geo. III. c. 60. s. [illegible]
(a) p. 264. Stat. 38 Geo. III. c. 60.
(b) Stat. 39 Geo. III. c. 6. [illegible]

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presentative. The objection, that this is the case of a remainder-man, was considered in *Tullit* v. *Tullit*,(c) and *Ex parte Bromfield*.(d) In the latter Lord *Thurlow* stated a case, exactly applicable to this.(e) "Where timber had been cut down by a stranger tortiously; and it was insisted, that by equity it ought to be restored to the estate; and it was refused, because there was no abuse of confidence, but it was the tort of a stranger: and, being so, it was held that there was no equity upon the subject, and I think, the Law now is, that, if timber was cut down so, it would be like the case of windfalls, and ought not to be restored by Equity." [*265]

That applies, if the trustees are to be considered as strangers, and if they had any interest the charge ought to subsist and be continued.

The Attorney General, Mr. Richards, Mr. Blanque, and Mr. Wetherell, for the Defendant [illegible] *Polhill*.—Under these circumstances it is quite impossible to restore the land-tax, that has been redeemed; to consider it as at present subsisting, and impose it in its original shape as a charge upon the estate for the benefit of the Plaintiffs. For that purpose, upon the principle, that the contract is to be annulled, [illegible] some persons representing [illegible] Another consideration [illegible] a charge substituting that for which [illegible] has applied. The clause in the Act 39 Geo. 3 [illegible] not intended to apply to this case; a purchase on behalf, and for the benefit, of the tenant in tail. That clause, introducing a provision for the benefit of remainder-men, interested in the estate, was made with another view. This was not a purchase by persons having an estate in remainder, acting for themselves. A tenant in tail adult must have made an option, there being no distinction upon the Act between tenant in tail, and tenant in fee: or, declining to make it, he would be considered as having declared his intention to exonerate the estate. The remainder-man would have a right to expect, that he should make good the contract he entered into; and he must be supposed to intend to complete it. That is the effect of the Statute 42 Geo. 3, c. 116, s. 166, which, though it passed after the contract entered into, is explanatory of the contract. [*266] But, independent of such a provision, the necessary effect of the contract itself is, that the person entering into it shall be bound to make it good. The 17th section of the first Act shows the general object of the Act; the annihilation of the land-tax, unless the contrary intention was declared by the party. The whole

(c) Ambl. 370.
(d) Ante, vol. i. [illegible] Ovenden v. Ld. Compton, ante, vol. ii. 69.
(e) Ante, vol. i. [illegible] Stat. 39 Geo. [illegible] 34.

1805. WARE v. POLHILL. effect of the proviso at the end of the 18th section is, to enable a tenant in tail in remainder, substituting himself as the redeemer, to declare the same option, as he must if he had been originally entitled to the redemption. The 37th clause will not help the claim. The person, who had this right of redemption, had an estate of inheritance, and therefore is under the general provision: not the clause providing specially for those, who have not an estate of inheritance.

Then is there a distinction upon the case of an infant tenant in tail: the person interfering not being vested with the character of trustee or guardian, acting *bonâ fide* with the intention of benefit to the infant: no fraud: no object to prefer the personal to the real estate: no view of advantage to either representative: out of such an Act is there any equity for one representative against the other? The infant survived the period, at which he might have shown his disinclination to prejudice his personal estate for the sake of his real estate, by making a will; and the circumstance, that he lived a considerable time beyond the period, at which he might by will have disposed of his personal estate, shows his acquiescence. These persons must be considered guardians by implication, having acted, and made themselves responsible as such without question, long after the age of fourteen, when the infant might have appointed a guardian. The general rule, as to tenant in tail, or for life, paying off an encumbrance,
[267] is laid down by Lord *Thurlow* in *Jones* v. *Morgan*.(d) Tenant in fee, paying off an encumbrance, to make himself a creditor upon the estate, must declare by some Act, that he did not intend it to merge for the benefit of the estate: otherwise that intention is presumed; though it may be as important to him to have his personal estate increased as to tenant in tail, or tenant for life. The same presumption is raised by the Law in the case of tenant in tail, though he has but a partial interest in many respects, as owner; but he may make himself so. Whether he leaves issue, or not, no distinction is made. Yet this is a grievance upon the next of kin, perhaps daughters: the estate being in tail male. In the case of tenant for life the presumption is the other way. In either case it is no more than presumption, which must stand in this instance, as in the case of an adult: the infant having survived the age, at which he might have done an act to repel it. The payment of an encumbrance by a guardian out of the savings discharges the estate; as if the payment had been made by an adult. There is no instance of permitting the party, when of age, to call upon the

(d) 1 *Bro. Ch. Cas.* 206.

guardian for an account of money so laid out. Lately it has not been unusual for the Court, directing a conversion of an infant's personal property, to keep up the charge, in case the infant should afterwards think proper to have it in that shape. This is not a necessary equity: but it has been done, where the attention of the Court has been called to it: but if not desired, the Court look no further than the infant, not to the representative. 1805 Wi.. v. Polhill.

The 11th section of the first Act, that committees, guardians, &c. may contract for the redemption of the land-tax, goes much further, giving most extensive powers, in order to afford every facility to the redemption which was the great object of the Legislature. Therefore persons, clothing themselves with the character of trustees, are under that Act enabled to contract for an infant. Upon the point, whether they ought to have made an option, if the transaction is effectually and legally done, and under the Act the land-tax is actually extinguished, and cannot possibly be revived, the party may perhaps be answerable to the cestui que trust: but the estate, being by virtue of the Act exonerated, cannot be charged. The effect is the same as if a person had blindly and foolishly thrown away his money, not preserving the benefit to himself as a stranger, after the period of preference has gone by. [268]

As to the question, whether there is any equity between representatives, it is established, that where a person is acting *bona fide* for a lunatic or an infant, without any intention to prefer either representative, there is no equity between them; but the thing must stand, as it is, and they must take the property, as they find it: *Inwood* v. *Twine* (a); *Flanagan* v. *Flanagan*: (b) a very strong case; a sale of more property than was necessary for debts, under an order of Court, by mistake: a sufficient part having been previously sold: it was held, that the surplus should go as personal property, being considered as an accidental advantage to one representative, without any intention of fraud or preference, and therefore no equity arising: *Oxenden* v. *Lord Compton*; (c) *Chetty* v. *Parker* (d). The case of a stranger put by Lord *Thurlow* in *Ex parte Bromfield*, (e) is the strongest.

As to the leasehold estates, the decree in *The Duke of Newcastle* v. *The Countess of Lincoln* (a) shows, that, if the Court finds the intention to keep the freehold and leasehold estates together as long as is possible, the Court, if it has any thing to do, will direct the conveyance in a [269]

(a) Amb. 417. (b) [illegible]
(c) Ante, vol. ii. [illegible]
(e) Ante, vol. i. [illegible]. See [illegible]
(a) p. 269. Ante, vol. iii. 387. Upon the appeal, post, vol. xii. p. [illegible]

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mode, that will answer that purpose. Upon this will the intention not to give the infant so large an interest, before he was of age, is evident from the power to the trustees to sell the leasehold estates, and invest the produce in freehold estates, and the disposition of the general residue also, to be laid out in lands, to be conveyed to the same uses. The intention was to accumulate as much real property as possible. The legacies of 10,000*l.* in the event of the decease of the legatees were to fall into the residue, and be laid out in real estate. The interest of the money until the sale is given to the persons entitled to the rents and profits of his freehold, copyhold, and leasehold estates, mentioning them all. The fair construction is, that the power of the trustees is not confined to the time, while a tenant for life is in possession, but extends to the period, during which persons are entitled in tail. The operation of the word profits may be by the circumstances limited to its natural meaning, annual profits. *Lowe* v. *Gilbert*, (*b*) and then there is no express disposition of the estate itself, only a direction to the trustees to pay the rents to the persons, entitled to the rents of the freehold and copyhold estates, from time to time. Plain expression in a will is controlled by the evident intention. Certainly a distinction has been taken upon that between marriage articles and wills, (*c*) first, on the ground that the former are executory: secondly, as being under con-

[270] tract. The only sensible distinction is upon the different degrees of difficulty in ascertaining the meaning of the parties to a marriage settlement, and the intention of a testator. In the former the object is evident, to contract for the benefit of the children, and prevent the absolute power of the parent over the property. In the case of a will, it may be more difficult to find the intention: but, if the intention can be found, the Court will act upon it as much as in the case of articles. That is the result of all the authorities, collected in *Mr. Powell*'s note (*a*) to *Fearne's* Executory Devises. It is true in *The Duke of Newcastle* v. *The Countess of Lincoln* (*b*) the words "as "far as the Law will permit" were relied on: as they were before in *Gower* v. *Grosvenor*: (*c*) but that must always be supposed the intention. By the effect of the power to sell the infant could not have the absolute property before the age of twenty-one. Such a power has not occurred in any of the other cases, in all of which the property must clearly have remained personal estate.

(*b*) 2 *P. Wms.* 13.
(*c*) *The Duke of Newcastle* v. *The Countess of Lincoln*, *ante*, vol. iii. 387; *post*, vol. xii. p. 218.
(*a*) p. 270. *Fearne's Exec. D.* 1[illegible]7. Edit. 4.
(*b*) *Ante*, vol. iii. 387, *post*.
(*c*) *Barnard. Chan. Rep.* 54.

Mr. Romilly, in Reply.—Upon the Act of Parliament, the Legislature did not intend to give guardians any authority to convert personal estate into real, or enable them to improve the real estate by redeeming the land-tax. They are enabled only to apply real estate to that object by sale, mortgage, or granting rent-charges: the particular mode pointed out by the twentieth section of the first Act. The effect is, that what was real estate before still continues so. That is analogous to the present course of this Court, which as now established, whatever it may have been formerly, is not to authorize the conversion of personal property into real: but, where it is for the benefit of an infant, that any purchase should be made of real estate, the Court uses anxious care to preserve it for the personal representative, if the infant should die under age. Your Lordship would not permit it to be otherwise in *Lord Ailesbury* v. *Lady Brudenell*. (a) In *Ex parte Phillips* (b) Lord *Eldon* states that to be the constant practice; and in those instances the infant was seised in fee, not a mere tenant in tail, as in this case. The proposition is extraordinary, that though the Court would not itself have done this act, and would have taken care to prevent it, yet, that, if done by persons, acting as guardians, it shall be maintained. There is a case, going much further; where by Law a charge is merged by uniting with the real estate, the Court takes care to preserve it, as distinct property, for the personal representative: *Thomas* v. *Kemish*, (c) which went to the House of Lords; and has been recognised in many subsequent cases. *Chester* v. *Willes*, (d) in which case the distinction is taken between tenant in fee and tenant in tail. This is compared to the case of the lunatic, *Ex parte Bromfield*, (e) and *Oxenden* v. *Lord Compton*, (f) in which another question arose, upon a charge coming to the lunatic, entitled also to the real estate. *Lord Compton* v. *Oxenden*, (g) and Lord *Rosslyn* certainly held, that there was no equity. The lunatic was tenant in fee. It is not material to consider, whether that is a sound distinction. It is enough to say, Lord *Rosslyn* distinguishes expressly between lunatics and infants; the latter case "turning upon a supposed intent (h) He puts a much stronger case, of an infant tenant in fee: upon the ground, not of an actual election made, but of the clear advantage of the infant, that the charge should not merge," from his actual power to dispose of the personal estate; whereas

(a) *Ante*, vol. vi. 6.
(b) *Ante*, vol. i. 457.
(c) 2 *Vern.* 348. 1 *Eq. Ca. Ab.* 96. ... 10.
(d) *Ambl.* 246.
(e) *Ante*, vol. i. 453.
(f) *Ante*, vol. ii. 69.
(g) *Ante*, vol. ii. 261.
(h) *Ante*, vol. ii. 264.

1805. of the real estate until the age of twenty-one he is in effect but tenant for life. If a mortgage upon the estate of an infant tenant in tail was paid by his guardians, and the conveyance taken to him and the heirs of his body, there would be a merger at Law: but this Court would set it up as a charge for the personal representative. If tenant in tail adult does not pay the interest of an incumbrance, the arrear goes to increase the charge: but upon *Sargeson* v. *Cruise*,(a) if the guardian of an infant tenant in tail suffers the interest to run in arrear, the Court will interfere, and make the personal estate applicable to that arrear. It would be strange, if the Court should consider that as done, which ought to be done, for the disadvantage of the infant, and not for his advantage. This resembles the case of *The Countess of Shrewsbury* v. *The Earl of Shrewsbury*.(b) An infant tenant in tail is in substance nothing more than tenant for life. He can only receive the rents, and in the event of his death the estate must go to the heir. Can an infant, who is only competent to bind himself for necessaries, be bound by mere acquiescence, though he would not be bound by a formal deed?

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These persons were in truth mere strangers, not guardians. The act contemplated trustees by contract, not constructive trustees in Equity merely by taking upon themselves to deal with the infant's property. The representative must therefore be entitled either to a rent-charge [273] upon the estate, or to compensation from the trustees. As to the instalments, that became due after the infant's death, upon the principle, much discussed in *Jackson* v. *Cator*,(a) the Defendant *Polhill*, permitting *Maitland* to act upon a mistaken notion, was bound to give it effect.

As to the other question, the distinction between articles and wills is fully recognised in *The Duke of Newcastle* v. *The Countess of Lincoln*.(b) But that distinction is not, as it has been represented: but, that the intention is expressed shortly: the party knowing, another instrument was to be executed. That principle distinguishes the case of an immediate devise. Where technical words are used, that have acquired a certain sense, the Court has no power to depart from the legal effect of those words, though they see, that by adhering to it the intention will be defeated, as it would lead to such consequences: for instance, an inquiry, whether the testator was a lawyer, and understood the effect of those words, &c. This testator has not expressed, that these estates

(a) Cited 1 *Ves.* 477, in [illegible] v. *Brown*. (b) *Ante*, vol. i. p. 27[illegible].
(a) *Ante*, vol. v. 688.
(b) *Ante*, vol. ii. 387. See the Appeal, *post* {vol. xii. p. 218.}

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shall go together, as long as the law will permit. The effect of the words of limitation is very different as to real and personal estate; giving the absolute interest in the one, and an estate tail only in the other. That is the consequence of law, though the same interest in both may have been intended; as every testator intends, that each species of estate shall go to the series of heirs pointed out. It has not been held in any case, that leasehold estate, given by words, that would, if applied to freehold estate, create an estate tail, shall not vest before the age of twenty-one, unless accompanied by some words to this effect, "to go together, as far as the law will permit," or some other expression, showing, they are to be unalienable until a certain period. Upon this will, the Court is desired, first, to infer that general intention, that the estates shall go together, as far as the rules of Law and Equity will permit; and to imply the intention, that the further term, that the leasehold estate shall be unalienable until the age of twenty-one. Such a decree will be a novelty, and the consequence is important. According to the construction, that the power in the trustees subsisted beyond the estate for life during the estate tail, it should continue beyond the age of twenty-one, if the tenant in tail survived that age without suffering a recovery, and he could not convert the leasehold into real estate of his own authority, the concurrence of the trustees being necessary. The intention was only, that the trustees should have this power, as long as any trust remained: that is, until some person acquired an estate tail in possession. At that moment there was an end of all the trust, and consequently of the power. The will does not contain an expression, showing the testator contemplated the difference between a tenant in tail under the age of twenty-one, and above that age. The effect of the Defendant's construction is only to defer the separation of the estates a little longer; admitting, that, if the infant had lived two months longer, it must have taken place.

The Lord CHANCELLOR.—As to the first point, this case is very material in many respects. The facts require it to be considered with reference to what ought to be the decision, if these persons had been either guardians or trustees, or falling under the larger description of the act, in terms, the meaning of which is not very clear; persons having authority to act for infants; and also with reference to the fact, that they had kindly and honestly, (which [275] is the fact,) interposed without any authority whatsoever. The property was devised in such a way, that the person deceased as to these estates was tenant in tail, having therefore in a sense an estate of inheritance, but yet more

1805. limited than a fee-simple estate, and held during the infancy: being an interest, with regard to which this Court deals very differently, when considering questions between the personal representative of such tenant in tail and the remainder-man, from what it would, if the tenant in tail had been adult, with regard to whom the Court supposes, not very accurately, that such tenant in tail has in all cases an immediate power of acquiring the fee In Lord *Shrewsbury's* case,(*a*) being tenant in tail under an Act of Parliament, and not having that power, he was considered as tenant for life This infant was likewise entitled by accumulation to a great deal of personal property These persons thought it beneficial for the infant and all in remainder to redeem the land-tax Contracts were entered into for that purpose, and a considerable part of the personal estate of the infant was applied in his life and since his death It is insisted, that this transaction was effectual to exonerate the estate from the land-tax and that those claiming in remainder are entitled to hold it without contributing in any manner to the payment or reimbursement of the money, which has gained for the estate the benefit of the redemption, leaving to the representatives of the infant and the persons, who acted, to settle between themselves that question, what is to be done, whether the personal representative is to be considered as having made a present of this money to those in remainder, or has a right to charge, not those having the estate, but the trustees, with the money so misapplied?

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276 This is contended to be a dealing under the Act of Parliament on behalf of a person having an estate of inheritance, and effectual therefore as a purchase of the land-tax, not as between persons having a preferable right to buy, and those taking in succession by way of remainder the possession of the estate; but as one of those cases of purchase on behalf of the owner of the inheritance, in which, no option having been declared, the estate ought to be considered as disburthened for ever from this charge, and the person, whose money was applied, as having no demand upon those, who take the estate in succession, and that these persons, if to be looked at as having power as guardians, had a right to do this and the Court is to consider this property as properly dealt with, though not for the interest of the party himself, but by accident for that of others. If this had been the case of actual guardians, the Court must find upon the principles, on which it acts, the means of saying as against those who took the benefit of this act,

(*a*) *The Countess of Shrewsbury v. The Earl of Shrewsbury, ante,* vol 227

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that they were bound in Equity to make good to the infant the situation in which he would have stood as to his personal estate, if the guardians had done what they ought, when the personal estate was applied; and I suppose for the present, the guardians would have had a right to make the option. Some difficulty arises upon the words "estate of inheritance" in the last clause (a) that has been relied on, whether they do not mean the fee-simple, which is mentioned in the 18th clause; for in many other clauses a tenant in tail is considered as having a particular estate and interest, having therefore preferable rights secured by other clauses. In construing this section, (37th,) it seems to me you must construe the words "estate of inheritance" with reference to the nature of the provisions of this clause, and that must refer you to the 18th clause, providing all these preferences with regard to persons not having a fee-simple, and therefore they meant by the words "estate of inheritance" in the 37th clause, what they meant by the words of the former clause "having an absolute estate or interest in fee-simple."

Then, if a tenant in tail adult can be within the 37th clause, if he made an option, and died afterwards without a recovery, he would have an Annuity equal to the land-tax, but redeemable by the person succeeding to the possession. If he made no option, then, if he died before a recovery, the personal representative might be contended to have a right to charge the estate with the amount of the stock laid out, with an interest, not exceeding the land-tax. But it is clear, if an application was made to this Court, representing, that there was an infant tenant in tail, that it was inconvenient to sell part of the estate under the Act, and that he had in this Court a sum of money, part of the general personal estate, the Court never would have authorized the guardian to contract for the land-tax, without directing him to make such an option as should preserve for the personal representative of the tenant in tail, if he died an infant, the benefit of that money, so applied; and the Court itself would have been so strongly bound by its rules as to not altering the nature of the property of the infant, that it would not have permitted the purchase, if that could not be arranged.

The principle as to infant tenants in tail is very strongly marked by the cases of merger, and those cases are extremely well accounted for by the principle upon which the Court maintains its doctrine as to tenants in tail adult, viz. if a tenant in tail adult pays off a mortgage, or becomes entitled to a charge, as he might acquire, (as the

The case of merger with reference to tenants in tail, infant, and adult.

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(a) Stat. 38 Geo. III. c. 60. s. 37.

1805. Court is in the habit of saying, somewhat inaccurately,) the absolute ownership, a presumption arises, that his intention was not to keep alive the charge But if that is the principle, though he happens to die, without having suffered a recovery, the principle does not apply during infancy The Court is in the constant habit of saying, a due administration requires them not to change the nature of the property as between the representatives. I have uniformly made it a rule, since I have sat here, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age, at which he will have a disposable power, the representative shall not be prejudiced in any degree by the act done by the Court in contemplation of the infant's benefit, in all the circumstances surprise or accident can throw round it (a) It is said, this is the effect of the Court's declaration, but if the Court forgets to make that declaration the same rule does not obtain, and the Court has disposed of the property by an imperfect judgment in another manner, and subject to different equities That is not correct, for the declaration is made, because that is the law applicable to the case of the infant and it is of course to reform the order It does not create the right, but is a declaration of a pre-existing right so to have the property secured. Then the Court in that determines no more than that the guardian or trustee ought to do so, and determines therefore, that, if they do not do so, they act unduly by the infant. The question then is, whether, where the infant, who can make no option himself, has a person acting for him, who ought to make that option, that will preserve the estate with such quality, as it had before, it is possible to doubt, a third person shall not be at liberty to say, he will take the benefit of the misapplication, but, taking that benefit, he will not permit the infant to have that set right, or, in other words, who insists upon binding the guardian or trustee to such a transaction for his benefit, as he must be taken to know at the time he ought not to enter into with him. Supposing them to have been actual guardians, it is impossible to maintain, that those who have got the property in that way, can hold it without permitting an incumbrance in some shape, to do justice to the infant.

WILL v. POLLITT.

Conversion of the property of an infant for his benefit guarded so as not to change the nature of it as between the representatives

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As to the other way of putting it, it comes to the same thing, for, if they say, the land-tax is not redeemed, then the course is different: but it is substantially the same for then, if, having the estate, they mean to insist upon that fact, it is the duty of the Court, for the benefit of the personal representative, to direct some course, that will

(a) *Lord Ashburton* v. *Lady Ashburton*, *ante*, vol. vi. 6.

bring back to the assets the money so applied, for the sake, not only of the representative, but of the trustees also. The consequence is, that these persons would hold the estate subject to the land-tax; and I cannot say, the effect of the mistake is, that they shall keep the estate, and the trustees shall lose the money. Therefore, if the Defendants are willing to take the estate upon the same terms, as they could have had it, if these persons were really guardians, upon the same principle, for the benefit of the infant, he must either be entitled to the Annuity, subject to redemption by those, who take afterwards, as a person, upon whose behalf the guardian ought to have made an option; or, if not, he must be considered as having a right at the time of the purchase to have an option made for him; but none was made in fact; and the result is, if he cannot have the Annuity, he would be entitled to have a charge upon the estate to the amount of the money so applied, with an interest, not exceeding the amount of the land-tax. 280

1805. Ware v. Polhill.

As to the leaseholds, I own this is a question that seems to have some degree of difficulty; for I think, when the testator inserted the power in this will, he meant a great deal more than the Court can by construction allow that he did mean; and I doubt, whether I am authorized to say upon the words used, he meant either that at all, or exactly that, as part of the whole, which *The Attorney-General* contends for. Until the case of *The Duke of Newcastle* v. *The Countess of Lincoln*, (a) I took it with a confident opinion to be difficult to obtain such a decree as has been made in that cause; for, when a testator directs his leasehold estate, or heir looms, or personality of any description, to go with the freehold, as far as the rules of Law and Equity will permit, it seemed very difficult to say upon those words, that it was not the intention to make that unalienable by the effect of those words, as long as he could. Yet the constant course of decision, I admit, has been, that an absolute interest would vest in the first taker of an estate tail. That case, if it is to stand, establishes this sort of distinction; which has foundation in the principle of those cases, alluded to by *Mr. Romilly*, that, where tenant for life under legal limitations, with contingent remainders, by destroying his life estate, may destroy all afterwards, and take the estate to himself, there is no doubt in both cases the testator meant the same thing: but he has not adopted the same mode of doing it; and, where any thing is left to the Court to do, the Court have said, they will do no more than the testator has directed. Whether that distinction will sustain that

As to the effect of a direction by will, that personal property shall go with a settled estate, as far as the rules of Law and Equity will permit. Qu.

(a) *Ante*, vol. iii. 387. Upon the appeal, *post*, vol. xii. p. 218.

1805. Ware v. Polhill. case, I do not * know. But that case does not apply to this, unless you can infer from the power given here, that all this was meant; that, whether the trustee did exercise the power or not, whether any tenant for life, adult, ever gave his consent to the exercise of the power, or withheld it,
[* 281] the person, who should take under the first words the absolute interest, as the infant would, should have that cut down, the intention being, that, if this son should die under twenty-one, it should go over in all circumstances. It is very difficult to say, the words are so precise, so clearly indicative of the intention, as to authorize the Court to say, that is the effect. I do not apprehend, that, if the Court was to execute this as an executory trust, that is the disposition it would have made, or, that from the bequest over you can collect, that you ought to make that disposition.

My inclination is, that there are not words enough to restrain the effect of the former words; but still if the Defendant will take a case, I will give it.

Upon the first point, the infant must either have an Annuity, as if the option was made, redeemable by the subsequent takers, or a charge with an interest, not exceeding the land-tax. Which is most beneficial I do not know. If you are content to consider them as the guardians, and him as the purchaser of the land-tax, I rather think, the decision ought to be upon the principle, that the guardians ought to have made the option.

July 18. *The Lord* CHANCELLOR.—As to the principal demand, these persons were not guardians, trustees, nor do they appear to have been persons within the Act having authority to deal, as they have dealt. Consequently, in strict-
[282] ness this is not a transaction under the Act. The equity therefore must be of this sort. I still think upon the whole of the act, the tenant in tail is a tenant, not having an estate of inheritance within the 37th clause. Therefore if these persons were actually guardians, they might have dealt, if not with the infant's personal estate, by means of his real estate, for the purchase of the land-tax: and in that case they might have made an option. If they had made the option, the consequence is, he would have been entitled to an Annuity, as against the remainder-men, redeemable in the manner directed by the Act; if no option was made, he would have had a charge to the extent and amount ascertained by the 37th clause. The question then is, whether, as the estate has got the benefit of the transaction, precisely as it would, if they had been the guardians and trustees, and acted as such under the

authority of the Act, there is not an equity to have the estate, as nearly as may be, chargeable, as it would have been charged in that case under the Act. My conclusion is this: I fear, he cannot have the land-tax; i. e. an Annuity, secured, as the Act does secure it. For, it is not within the Act. The 37th clause does not apply to the case. The contract has been made by the Commissioners, not with guardians, trustees, or any persons, who could act for the infant, but with persons, not having any character, enabling them to deal for him. The consequence is, that he should be declared entitled to an Annuity, such as he would have, if he had an option, secured by grant of the tenant for life, and by holding and enjoying against the tenant in tail, until of age; then requiring him to make a grant: but in both cases the grant to be redeemable, as it would have been under the Act, if the transaction had been strictly under the Act. Being out of the Act, the relief must be by an equity, to charge the estate, not by virtue of the Act, but by a decree to secure payment of precisely the same consideration as they would have paid, if it had been within the Act. I must do it as near as I can. It is like the case I mentioned upon the argument; an estate charged with debts: the first taker an infant; and out of his estate all the debts paid, improvidently in this respect, that the creditors had cancelled all their securities. I must by an equity have given that infant's estate a charge against the real estate, as nearly as I could, if he had taken an assignment of all those securities I now suppose to have been cancelled. [283]

Debts charged upon an estate paid out of the estate of the first taker, an infant. The infant's estate reimbursed by a charge, though the securities had been cancelled.

The Lord CHANCELLOR.—Upon further consideration as to the leasehold estate, I think, that power of sale is void; for it may travel through minorities for two centuries; and, if it is bad to the extent, in which it is given, you cannot model it to make it good. I think, the soundest ground is, that the power is bad. *Feb.* 20.

1805

November

DOLDER v. LORD HUNTINGFIELD. (1)
ST. DIDIER v. LORD HUNTINGFIELD

Whether a Defendant can by answer refuse the discovery, insisting, that he is not bound to answer, *Query* (2)

But, having given part of the discovery, he was compelled to answer as to the rest.

Whether a foreign state, not acknowledged by this country, can maintain a suit here, viz. the Government of *Switzerland*, in consequence of the revolution, suing for stock, vested in trustees by the former Government, *Query*. (3)

THE bill in the first of these causes stated, that previously to 1798 the magistrates and persons to whom the powers of government of the several *Swiss* * Cantons were respectively vested, remitted large sums to their agents in this country, for the purpose of being invested in the public funds, and that large sums were so remitted by the Governments of the Cantons of *Berne* and *Zurich*, and the town of *Neufchatel*, which were part of the public monies of the said Cantons and town respectively, which sums were invested accordingly for the public use of such Cantons.

The bill then stated the several funds, in 1798 standing in the books of the Bank of *England* and the *South Sea* Company, in the names of the Advoyer, the Less and Grand Council of the City and Canton of *Berne*, the Burgomaster, the Less and Grand Council of the Canton or State of *Zurich*, and the town and citizens of *Neufchatel* that prior to 1798 the said Cantons of *Switzerland* were separate and independent States connected by a certain league; and in that year the several Cantons became united and consolidated into one independent State or Commonwealth, which assumed the name of the *Helvetic* Republic, and have ever since remained so united; and from that time the said several States or Cantons ceased to exist, and there were no persons, answering the description of the former respective Governments.

[* 284] The bill further stated that by a law of the *Helvetic* Republic, passed on the 12th of *March*, 1799, it was declared, that the property, acquired by the then late Governments of the said Cantons, as representing the sovereignty, was national property, that part of said funds, (specifying them,) had been assigned by the *Helvetic* Republic to *Antoine St. Didier*, of the City of *Paris*, merchant. The bill then stated the title of the Plaintiffs, as the Landamman and two Statholders of the *Helvetic*

{(1) Cited 1 Johns Cha. Rep. [illegible] 1 Johns Cha. Rep. 215, and remarked upon.}

{(2) Chancellor *Kent* recognised, in two late cases, (1 Johns. Ch. Rep. [illegible] 1 Johns. Cha. Rep. 205,) the rule as laid down by Lord *Thurlow*, in *Cookson* v. *Ellison*, 2 *Bro*. *C. C.* 252, that where a Defendant submits to answer, he must answer fully, subject, however, to exceptions in particular cases, that of an *innocent purchaser*, for instance, as in *Jerrard* v. *Saunders*, 2 Ves. jun. 454, *the deed of the executors of a copartnership*, as in *Jacobs* v. *Goodman*, 3 *Bro*. *C. C.* 205, and where the Defendant objects to a discovery, *because the Plaintiff has no title*, as in *Phillips et al.* [illegible] v. *Prevost et al.* 4 Johns. Ch. Rep. 205, where he examines all the *English* and [illegible] cases.}

{(3) *Rose* v. *Himely*, 4 Cranch. 241. *Gelston* v. *Hoyt*, 13 Johns. Rep. 361, S. C. 3 Wheaton. 321.}

Republic; in whom by the constitution of the Republic the executive power is vested; and prayed that the Defendants, the Bank of *England* and the *South Sea* Company, may be decreed to transfer to the Plaintiffs, and to pay the dividends accrued; and that the other Defendants, the agents, may be decreed to pay the dividend received by them. 1805. DOLDER v. LORD HUNTINGFIELD.

The agents by their answer, admitting the remittance and investment of the money in the funds, &c. and that prior to 1798 the Cantons of *Switzerland* were separate and independent States, connected by a league, stated, that in 1798, a revolution took place in *Switzerland*, and that the said several States and Cantons, and among others the Cantons of *Berne* and *Zurich* [illegible] ceased to exist, or to be separate and independent States; and that there was not from the time of such revolution any person, in whom the Government of *Berne* and *Zurich* was vested, or answering the designation of "Advoyer, the Less and Grand Council of the City and Canton of *Berne*, the Burgo-"master, the L[illegible] and Grand Council of the Canton or "State of *Zurich*, and [illegible] and citizens of *Neufcha-*"*tel*;" and that they are informed and believe, another revolution has taken [illegible] in *Switzerland*, and the powers of government are now vested in different persons from those, in whom they were vested at the times, when the transactions in the bill mentioned are represented to have taken place. They submitted, that the Plaintiffs upon their own showing by their bill have no title to the relief prayed, or to any account of the dividends, from the Defendants; and that *The Attorney-General* ought to be a party.

A similar bill was in *January*, 1803, filed by *St. Didier*, described as residing at *Paris*, claiming under the assignment, and a similar answer was put in. The Master having reported the answer insufficient in each cause, exceptions were taken to the report. The Defendants had, after the expiration of the usual time, applied for leave to demur, which was refused. [286]

Mr. Richards, Mr. Hollist, and Mr. Heathcote, in support of the Exceptions, upon the question, whether the Defendants, having put in an answer, were bound to answer throughout, cited *Newman* v. *Godfrey*; (a) *Jerrard* v. *Saunders*; (b) a case in the Court of *Exchequer*, upon a bill by a Vicar against the occupier, who by answer denied the right of the Vicar; but did not set forth the quantity and value, and an exception was overruled; which decision was followed by a late case in the same Court.

(a) 2 Bro. C. C. [illegible] (b) [illegible] 451.

1805. They also insisted, that the bill states no title in the Plaintiffs: neither, that the new Government is recognised by the Government of this country: nor, that it is the legitimate Government: that, though every state may by consent of the sovereign and inhabitants change the form of the Government, nothing like force, conquest, or subjugation, can give a title in a Court of Justice: the facts, that a *French* army had entered *Switzerland*, and gained possession of the country by force, after much blood-shed, were so notorious, that they may be stated in a Court of Justice, and under such circumstances it could not be represented, that the union took place with the free will and consent of the Government and inhabitants, which free will and consent are essential, and the law of the *Helvetic* Republic was merely declaratory, and could not give the right, not given by the union

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[287] *Mr Romilly, and Mr Bell, for the Plaintiffs.*—The question is, whether these trustees, having admitted, that this fund is in their hands, and, that they have received the dividends, shall not state, what dividends they have received Upon the general question, whether a Defendant may by answer insist, that he is not bound to answer, there are many contradictory decisions: but it was never decided, that a Defendant, having answered as to particular facts, may stop short, and refuse to give any further answer, as to the circumstances attending those facts. The proposition is most material. Great inconvenience would follow from receiving the objection at the hearing, instead of by plea or demurrer. The party may die, and the whole benefit of the suit may be lost by not compelling the Defendant to answer in the first instance. Shall the party take the benefit of the delay? What recompense can the Court make to the other party, in whose favour the decree is at last made, the object of the discovery being completely gone?

The result of all the decisions is, that, where a Defendant has submitted to answer, he is bound, unless in some particular case, to answer fully. As a general proposition, where the bill is filed for relief and discovery, if the Defendant submits to answer, he is bound to answer fully, unless from particular circumstances he can show something, exempting him from the general obligation to answer There are two excepted cases, proving the rule: 1st, where the discovery tends to criminate the person, from whom it is sought That is so fundamental a rule of the Law of this country, that Equity, interfering to prevent the application of the general Law to work injustice, will not interfere against that rule. The other exception is a purchase for valuable consideration: where by accident, perhaps negligence

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the plea is defective in form; and the whole * relief is substantially obtained by the discovery, upon which the Plaintiff may go to Law. In *Gethin* v. *Galo* (a) Lord *Hardwicke* was struck with the hardship of the case; and distinguishes it from the case of a creditor or legatee. The cases that followed, are *Newman* v. *Godfrey*, (b) *Cartwright* v. *Hateley*, (c) *Shepherd* v. *Roberts*, (d) *Hall* v. *Noyes* (e). The Court cannot in every case judge of the materiality. *Jacobs* v. *Goodman* (f) has always been pressed upon the argument, that in this way any man might compel the first mercantile house in *London* to account. That argument has always been disallowed by Lord *Hardwicke*, though it had weight with the Court of *Exchequer* in that case, and was in a subsequent case taken up by Lord *Rosslyn*: *Selby* v. *Selby* (g). *Jerrard* v. *Saunders* (h), *The Marquis of Donegal* v. *Stewart*, (i) and *Phelips* v. *Carey* (k) are the only cases, besides *Jacobs* v. *Goodman*, (l) in which the Defendant was held not bound to answer fully, and no reason is given, except in *Jacobs* v. *Goodman*, which goes upon the hardship in the case of a partnership. That case might be met by a plea, which is not confined in time, as a demurrer is. The books and papers would furnish the strongest evidence, whether there was a partnership or not, and the strongest inference arises from declining that production. This would lead to an examination of the propriety or impropriety of the discovery in every case. In *The Marquis of Donegal* v. *Stewart* there was no inconvenience in compelling the Defendant to discover the prices of the pictures; but there was great inconvenience the other way; the very object of the bill being to detect the imposition. Suppose, in *Phelips* v. *Carey* the Defendant had admitted that 100*l.* was due, and, that he had assets for that: upon the particular statement of the bill perhaps that answer would have been sufficient: but, if it is to go beyond that, it directly overrules what Lord *Hardwicke* says as to a creditor and legatee in *Gethin* v. *Galo*, that they are entitled to an account, which must suppose a debt or legacy disputed. The result of all the authorities, from *Sweet* v. *Young* (a) down to *Jacobs* v. *Goodman*, is, that the Defendant must take advantage of his situation by plea or demurrer, and in *Jacobs* v. *Goodman* the Court appears to have been struck with the argument, that in 289

(a) Stated [illegible] 51, in *S*[illegible] v. *Y*[illegible] (a) [illegible] *Bro.* [illegible]
(b) 3 *Bro.* C. C. [illegible] 8 *Ante*, vol. i. [illegible] (c) 3 *Bro.* C. C. [illegible]
(e) 3 *Bro.* C. C. 483.
(f) In the Court of *Exchequer*, 3 *Bro.* C. C. 4[illegible], n.
(g) 4 *Bro.* C. C. 11. (h) *Ante*, vol. ii. 454.
(i) *Ante*, vol. iii. 110. (k) *Ante*, vol. ii. 107.
(l) In the Court of *Exchequer*, 3 *Bro.* C. C. 487. [illegible] p. 289, [illegible]

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this way Bankers might by the suggestion of a partnership be compelled to set forth all their accounts. These Defendants do not put themselves upon the point, that they are in such a situation, that they are not bound to answer: but, admitting, that to a certain extent, as to the funds themselves, they must answer, insist, that they will stop short, and refuse to go into the particulars.

It is objected, that the bill should state, either, that the new Government is recognised by the Government of this country, or, that it is the legitimate Government of the country. That argument is not conformable to the rules of pleading in this Court. It is not necessary in a bill for an Annuity, to state, that all the circumstances required by the Act of Parliament have been complied with, or, in a bill to carry an agreement into execution to state, that it is upon the proper stamp. Those circumstances are assumed, unless the contrary appears.

[290] The remaining question, whether it is necessary, that the government of this country should have recognised the new government of *Switzerland*, is a most important consideration, as to the legal doctrines and the political consequences it involves: viz. whether, when a foreign Government has invested money in the funds of this country, upon the faith of our Government, merely on account of some constitutional alteration, however inconsiderable, in the form of the Government of that country, the *British* Government has a right to say, the money so invested belongs to them, and not to the Government of the country, by which it was invested. That is an extraordinary proposition. Suppose, previously to the union with *Scotland*, the *British* Government had money in a foreign Bank, could the Government of the country, in which that money was invested, have claimed it on the ground, that the union was not recognised by that government? The same case might have arisen upon the revolution in 1688. As to the Plaintiff in the second cause, they ought to have pleaded, that he was an alien enemy: a plea held to great strictness both in Law and Equity. The bill states only, that he was residing at *Paris* in 1793, upon which ground several of his Majesty's subjects might be considered alien enemies.

Mr. Richards in Reply.—Upon the question of pleading there is certainly great want of uniformity; and the late authorities are in favour of the Defendant. *Jacobs* v. *Goodman*, (a) *Jerrard* v. *Saunders*, (b) *The Marquis of Donegal* v. *Stewart*, (c) and *Phelips* v. *Caney*. (d) In

[291] *Gunn* v. *Prior*, which is not in print, the bill was filed by

(a) 3 Bro. C. C. 487.
(b) *Ante*, vol. ii. 454.
(c) *Ante*, vol. iii. 446.
(d) *Ante*, vol. iv. 107.

a person, claiming as heir at law. A plea, that he was not heir, was disallowed. Then an answer was put in, insisting, that the Plaintiff is not heir. Upon exceptions to the report as to the sufficiency of that answer, Lord *Kenyon*, sitting for Lord *Thurlow*, held, that if the Plaintiff was the heir, he was entitled to all the discovery sought by the bill; if he was not the heir, he was not entitled to any discovery; that therefore the preliminary fact must be ascertained; and an issue was directed upon this principle, that, if an allegation is made by the Defendant of a fact, destroying the Plaintiff's title, whether it is by way of plea or answer is immaterial. In either case that must be first decided. *Selby* v. *Selby* (a) was a different case; for there was a devise to *Lowndes*, in case no heir should appear within a year. He was without doubt the acknowledged devisee, and took possession; and the year elapsed, long before the bill was filed. A bill of discovery was filed by [illegible]; and Lord Chief Baron *Eyre* said, that bill must be answered in all its parts. The case of *Cookson* v. *Ellison* (b) which really cannot be considered as a decision, [illegible] in all these cases. A [illegible] upon what ground is that [illegible] rule? Why is not a purchaser as much bound to [illegible] as any other person? The discovery is not relief, but merely ancillary: the allegation here, that the Defendant holds deeds belonging to the Plaintiff, as the estate belongs to the Plaintiff. If the Plaintiff could prove, that the Defendant has the title deeds, he would be entitled to a decree for them without putting the Defendant to answer. A bill to carry an agreement into execution does not aver, that the agreement has been stamped; as, though not stamped, it is not the less an agreement. It is enough, if it is stamped even during the hearing (a). It is not necessary to state, that an Annuity has been duly enrolled; as without enrollment there is no grant giving the party a title to sue as an Annuitant. The circumstances of this case are now matter of history.

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The Lord CHANCELLOR.—You would be obliged upon an indictment for a libel to prove, that *France* is now at war with *Austria*; not as to the war with this country; the Courts taking notice of that with reference to our own country.

War between foreign countries must be proved; but the Courts take notice of a war in which this country is engaged without proof.

Reply.—Such a body as this, not acknowledged by this country, is not entitled to sue in the Municipal Courts of this country. The comparison to the union with *Scotland*

(a) 4 Bro. C. C. 11. (b) 2 Bro. [illegible]

(a) *Ante*, vol. ii. [illegible]

(a) p. 292 *Coles* v. *Trecothick*, *ante*, vol. ix. [illegible]

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does not hold. This country, with its government by the King and Parliament, still continued the same, with that accession. There was not an end or dissolution of the nation, as a nation. Upon the revolution in 1688 the constitution remained precisely the same: with the change only of the King, a part of the legislative sovereignty of the country: the supreme power being in the King and Parliament. This is a total dissolution of the country, not merely the introduction of a new chief magistrate into the same country, that reposed this confidence in these Defendants.

The Lord CHANCELLOR.—It is not necessary to make any observations upon the cases that have been cited. I remember it struck Lord *Thurlow*, who endeavoured to decide upon questions of pleading with analogy to the

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Law, as extraordinary, that, if there are settled modes, forming the practice, according to which a Defendant is to proceed, there could be a deviation from them.(1) The practice required a demurrer within a given time: or the Defendant could not demur alone, but must have applied for leave to plead, answer, or demur, not demurring alone. Most of the cases that have been stated, are distinct from this, for in those cases, taking the bill to be true, neither the Plaintiff, nor the Defendant, had any doubt, that the Plaintiff was entitled to relief. For instance, where a partner, prays a partnership account, if the partnership is admitted, the relief follows. So, where the Plaintiff is admitted to be a creditor or legatee, the bill sustains itself against any thing suggesting that no relief is due. But cases in modern times have said, that, if the Defendant denies some substantive fact, which, if admitted, would give relief, until the truth of that fact is disposed of, no further answer shall be compelled. Many topics of great weight must be disposed of, when that case comes to be decided, if it is still open. The Court has got to a species of plea, which is, neither a plea, answer, or demurrer, but a little of each. The consequence is, that the Commission must go to a number of facts, instead of one, as in the case of a plea. The late cases, as far as they are authorities, as to which I say nothing now, establish this; that if the bill is, both by the Plaintiff and the Defendant, allowed to give a right to the relief, if true, the Defendant, not demurring, not denying by answer the title to relief upon the bill, but negativing one fact positively, says, the Court, if they will take that fact not to be true, ought not to call for an answer. In order to make those cases authorities for the Defendants, they

[(1) See *Beames'* Elem of Pleas in Equity. *Pref.* p. viii. *n.*]

must say, that, taking the case, made by the bill to be true, they deny some leading fact. But that is not this case. 1805. Dolder *v.* Lord Huntingfield.

* The principle, upon which I dispose of this question upon the Master's report, is not connected in any degree with the merits of this cause. The question of merits is not decided by the *Maryland* case,(*a*) which does not touch such a case as this, a foreign independent State. That State was only a corporation under the Great Seal, dissolved by means which a Court of Justice was obliged to consider rebellious, and then the transfer of the title from the State of *Maryland* to any other State was a question a Court of Justice could look at as a question of law, only in one way; and the principle was, that the Court could not admit, that the title passed to the independent states of *America* by an act which we were obliged to call rebellion. What national justice was to do, after national policy had arranged the relative situation of the countries, was to be decided, and was decided, elsewhere. This is perfectly different. No civil offence has been committed against this country by the dissolution of the former Government, or the arrangement of the present Government, in *Switzerland*. The question is therefore to be discussed upon great principles of the Law of Nations, without attending to the situation of the Defendants, as subjects of this country. If it is true, that the Plaintiffs have shown, that they have no title whatever to the relief, (for that is the proposition,) the rules of the Court require a demurrer, before the Defendant comes here to ask for time to plead, answer, or demur, not demurring alone. The proposition is extraordinary, that a person, in a situation in which he must answer, and may, and is sometimes called upon to, state the want of parties, can say, that, as the suit hereafter cannot be effectual for want of parties, he will not answer at present. I do not understand the principle of that. I do not say, whether *The Attorney-General* is a necessary party.

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Stock in this country for the Crown of *Maryland*: distinction: the *American* revolution not affected by transfer during the war.

The Defendants applied for leave to demur alone, having got themselves into a situation in which they could not do that. Then the answer is quite new in this respect, that the Defendants, not being allowed to demur to the discovery or the relief, will discover what they please; and refrain from discovering the rest, putting in an answer that objection both to the discovery and relief, which ought to have come by demurrer. Upon that ground, refusing this, I cannot be said to shake any of those decisions.

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(*a*) *Barclay v. Russell*, ante, vol. 3. 424.

1805. Dolder v. Lord Huntingtower. As to the question, whether, if a new State was to arise in *Europe*, a Court of Justice is to take notice of it, if it does not appear by averment on the record; or upon an allegation, according to information and belief, that a revolution has taken place, first, those last words are too loose: 2dly, it is not easy to decide, what a revolution means in a Court of Justice, for, when a sovereign and the whole nation give their individual consent to the change, that is in a sense a revolution. There is another sense of that word, much more grievous. But I do not know that I can give a legal construction to such a word, unless a sense has been put upon it by authority in this country. My opinion is, that these Defendants must answer.

There is no difference in the other case, except, that the objection ought to come in a different form, with the observation, that is too much for me to suppose, that the title, made by the former Government, would meet with no attention from the present Government.

Exceptions overruled. (a)

(a) See Faulder v. Stuart, the next case.

FAULDER v. STUART. (1)

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[296] Dec. 7. 9.

Whether a Defendant can by answer refuse the discovery, possessing that he is not bound to answer, &c.

The answer held insufficient, as not being argumentative; and not containing positive averment.

Under the general charge as to the fact of payment the Plaintiff may interrogate as to all the circumstances, that go to prove or disprove the truth of the fact, as when, where, &c. without particular charges. (2)

THE bill in the first of these causes stated a purchase in 1799, by the Defendants *Daniel Stuart* and *Thomas George Street*, from *John Parry*, of the property and copy-right of *The Courier* Newspaper, in consideration of an Annuity of 400*l*., that in 1801, *Street*, in consideration of 600*l*. sold a moiety of his share to the Plaintiff *Faulder*, who in 1804 assigned that share to the other Plaintiffs, *Bosanquet* and Co. upon trust to secure the balance of his account with them, as Bankers, and prayed an account of the profits of the paper, and, that the Defendant *Stuart* may be decreed to pay one-fourth part, &c. according to the assignment.

The Defendant *Stuart* by his answer stated the circumstances of his original connexion with *Street* in publish-

(1) See the remarks of Chancellor *Kent* upon this and the next case, 1 Johns. Ch. Rep. 74.

(2) See 1 Johns. Cha. Rep. 76.

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ing the paper; that the Annuity to *Parry* was made redeemable upon payment of 4000*l.* and, as to a moiety, 2000*l.*; that certain conditions were agreed upon between them; one, that all the profits should be applied to the redemption of the Annuity; that *Street* was to subsist on a salary; that, to prevent the introduction of any improper person, it was agreed, that neither should sell, until an offer made to the other; and it was understood and agreed, that each was to have the option of purchasing, upon the terms any third person would give. The answer then stated, that all the purchase-money is now paid, and the Annuity redeemed; and all accounts between the Defendants ended to the 17th of *April*, 1804, with several other circumstances; that the Defendant had no notice of the assignment to the Plaintiffs until *May*, 1804, and not from them until *June*; that he believes, [297] the Plaintiffs privately received money from *Street* on account of the paper; that the Defendant has received different sums of money on account of the paper since the 27th of *January*, 1804; and insists, *Street* had no right to sell, until he had made an offer to the Defendant; that *Street* never did make that offer. The Defendant therefore insisted upon the agreement; and that *Faulder* could not purchase, nor *Street* sell, except subject to the Equity, under which he held; and claimed to be entitled to an assignment of the share upon the terms under which *Faulder* purchased; and, that it is immaterial whether the Plaintiffs had notice of the particular terms of the agreement between the Defendant and *Street*; but under the circumstances it must be presumed they knew *Street* could not assign without leave of the Defendant, and unless he declined to purchase. The answer further suggested, that the Plaintiffs had not made the affidavit, required by the Statute 38 *Geo.* 3. *c.* 78, upon a change of the property in a newspaper; and therefore the assignments, being made fraudulently, and kept concealed, are void; and insisted, that for the reasons aforesaid the Plaintiffs have not any right to compel this Defendant to come to any account for the profits of the said concern, or set forth any account of his receipts or payments on account thereof.

Exceptions were taken to the answer, for not setting forth what profits had arisen since the 27th of *January*, 1804, and whether the Defendant had not received and converted to his own use the whole, or part; and for not setting forth an account of the money accrued or received since the 17th of *April*, 1804, on account of the profits.

The Master reporting the answer insufficient, the Defendant took an exception to the report.

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The second cause was instituted against the Plaintiff in the other cause. The bill stated the same sort of case as the answer to the other bill; and, charging notice of the agreement, that *Street* should not sell his share without offering it to *Stuart*, prayed a declaration, that *Street* had no right to part with his share without previously offering it to the Plaintiff; that the Plaintiff is therefore entitled to the benefit of the purchase by *Faulder*; that an account may be taken accordingly of the consideration paid, and the money received, on account of such share; and, that the partnership may be dissolved.

The answer of *Faulder* made the same case as his bill; and stated, that he did not know, that it was understood and agreed, that neither party should sell his share without offering it to the other, &c.; that the whole purchase-money for *The Courier* had been paid, the Annuity redeemed, and all accounts between the Plaintiff and *Street* settled up to the time mentioned in the bill. Upon the assignment to the Defendant, *Street* requested, that the transaction might be kept secret from the Plaintiff, as it would lessen *Street's* influence [illegible]. The Defendant therefore kept it secret until [illegible] when [illegible], upon *Street's* absconding [illegible] informed the Plaintiff, that he was [illegible]. He admitted, he had received from the Defendant *Street* divers sums on account of the said fourth share of the profits of the said concern since the date of the assignment to the Defendant; and he received such sums previously to *June*, 1804, without giving the Plaintiff notice of the assignment, for the reason before mentioned. He denied, that, when the assignment was made, or, when he paid his purchase-money, he knew or suspected, that it was part of the agreement between the Plaintiff and *Street*, that *Street* should not sell without leave of the Plaintiff, or first offering the share to him. The Defendant was first told of
[299] it by the Plaintiff upon the 16th of *June*, 1804, after informing the Plaintiff of the assignment to the Defendant. He submits, he is not obliged to answer, and set forth, when, and where, and by whom, and to whom, and how, and in what manner, such consideration of 500*l.* was paid or given; such consideration never having been in any manner disputed or questioned by *Street*, who was alone concerned therein. He stated, that he has received divers sums on account of the said fourth share; but submits, that he is not obliged to set forth any account of the sums so received at the instance of the Plaintiff, being merely a pecuniary transaction between this Defendant and *Street*, in which the Plaintiff is not interested; and he submits, he is not obliged to set forth the particulars of the demands of the other Defendants, (the Bankers,) upon which

1805. [illegible] v. Stuart.

her claim to hold the security of his fourth part of the paper, nor, whether the indentures of the 10th of *February*, 1801, and the 7th of *January*, 1804, and the letters and notices by the Plaintiff to the Defendant, or books of accounts, papers, &c. relating to the advancement of the consideration for the assignment to the Defendant and the money he has received on account thereof, are in his custody, or to set forth the schedules, &c.

To this answer exceptions were taken: 1st, that the Defendant has not answered, when, where, by whom and to whom, the consideration of 900*l.* was paid.

2dly, That he has not answered, whether he and other Defendants, (the Bankers,) or any and which of them, has, or have not, received any and what sums of money on account of the fourth share, &c. nor an account of all and every sums of money, received by them or any of them on account thereof, and whether with the privity of the Plaintiff.

3dly, That he has not set forth the particulars of the demands of the Bankers upon the Defendant, &c. and how these demands are made out. [300]

4thly, That he has not set forth, whether the indentures of 1801 and 1804, and the letters and notices, sent to *Stuart* and the other Defendants, &c. books of account, papers, &c. relating to the advancement of the consideration, which the Defendant *Saunders* alleges to have been paid for the assignment to him, and the money, which he, or the other Defendants, or some of them, have received on account thereof, &c. or any and which, &c. are in the custody of the Defendant, and, that he has not set forth the schedules, &c.

The Master (a) having reported the answer sufficient, the Plaintiff took an exception to the report.

Mr. Romilly, and Mr. Bell, for the Defendant in the first cause, Plaintiff in the second, in support of the Exceptions, upon the general question referred to the argument in the case of *Dolder* v. *Lord Huntingfield, ante*, (b) relying on the case of *Jacobs* v. *Goodman* (c). Upon the particular circumstances of this case they insisted, that *Stuart* was not bound to answer, until it appears, that there has been a legal assignment, and that the Plaintiff is entitled to an account. They also relied upon the objection, that no notice was given, as required by the Act of Parliament, and observed, that the grounds upon which the Defendant insists he is not bound to answer, do not appear upon the bill, but it is necessary to state them by the answer.

(a) The answers were referred to different Masters.
(b) *Ante*, the preceding case.
(c) In the Court of Exchequer, 3 *Bro. C. C.* 487.

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that it is very difficult to say, how this defence, though a complete answer to the relief, could be stated by a plea, the defence consisting of a great number of facts, not of one short fact, that might be pleaded, or of a combination of facts, involving one point.

Mr. Richards, and Mr. Thompson, for the Plaintiffs in the first cause, Defendants in the second, insisted, that the answer of *Stuart* had gone so far, that it must of necessity go further; the Defendant admitting, that he has received money on account of the Newspaper, ought to set forth, what he has received. The late cases, which are certainly new, and have broken down the old rule, are not applicable. This is not a single denial of the Plaintiff's title; as, that he is not a partner, &c. But the answer states a variety of facts, and inferences from them, which are offered to the Court as reasons, why the Defendant should not answer further; having answered to a considerable extent, as far as he finds it convenient. Lord *Thurlow* strongly marked the nature and effect of a plea, stating some one specific fact, or a variety of circumstances ending in one specific fact, upon which the right to the discovery is put, and issue is taken upon that fact. But in this course, the Court is called upon to decide upon the effect of all these circumstances, without evidence; which shows the mischief and inconvenience of this new practice, that has crept in.

The Lord CHANCELLOR.—Upon the exception in the latter of these causes, the only question is, whether the answer of the Defendant to these points is material to the matters in issue. It all depends upon this, whether there is such a charge in the bill, as to the payment of the consideration, as entitles the Plaintiff to an answer, not only, whether it was paid, but, as to all the circumstances, when, where, &c. I have always understood, that general charge enables you to put all questions upon it, that are material to make out whether it was paid; and it is not necessary to load the bill, by adding to the general charge, that it was not paid, that so it would appear, if the Defendant would set forth, when, where, &c. The old rule was, that, making that substantive charge, you may in the latter part of the bill ask all questions, that go to prove or disprove the truth of the fact, so stated.

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As to the other exceptions, I have looked into all the cases, that were cited in *Dolder* v. *Lord Huntingfield*, and it will be a very painful and difficult duty, when the Court is called to it, to say, which of the various and discordant opinions, expressed by Lord *Thurlow*, Lord *Kenyon*, Lord *Rosslyn*, and Lord Chief Justice *Eyre*, is right. But there is no way of putting this case, in which it can

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he held, that the Master is wrong: for, if the point, intended to be stated by the answer, is right, stating it thus; that they meant to be joint proprietors, that verbally, or otherwise, (it is not material,) they agreed, that no sale should take place without the consent of the other without an offer of the interest to him at a price, to be named by a third person; and, that the person, who has purchased, had distinct notice of that agreement; if that either by plea or answer would protect the Defendant from answering further, it must at least be brought forward by the answer as distinctly and positively, as if it had been pleaded. This is without prejudice to the decision, to be made, when it shall be necessary, upon that point; for upon some of the authorities it will be found very difficult to say, that nothing can be pleaded in this Court but some fact, *dehors* the bill. I think, without going through the cases of purchasers for valuable consideration, and others, a plea may be composed of some facts, which were only a negative of some circumstances stated by the bill. But this answer is not a positive assertion of any thing, leaving the Court to determine, whether in the shape of answer or plea upon the truth of the facts; but it [illegible] all argumentative; and has some argument, that [illegible] cannot be maintained. There is not positive averment of right. Therefore overrule the exception to the first cause, and allow the exception to the second. The principle I go upon is, that, if they had not answered, but had pleaded in the terms in which they have answered, the plea must have been overruled (*a*).

Plea, not of extrinsic facts, but only a negative of some circumstances, stated by it. [*303]

(*a*) See the next case.

SHAW *v.* CHING.

Dec. 10, 11.

UPON exceptions the same question was made as in the preceding cases, *Dolder* v. *Lord Huntingfield*, (*a*) and *Dolder* v. *Stuart* (*b*). But the point was not determined; The Lord *Chancellor* being of opinion, that it did not arise.

Whether a Defendant can by answer resist the discovery, insisting, that he is not bound to answer, *Query*.

Mr. Fonblanque, and Mr. Martin, for the Defendant, to whose answer the exception was taken, referred to the arguments, and the authorities cited, in *Dolder* v. *Lord Huntingfield*, and *Dolder* v. *Stuart*; observing, that this defence could not be made by plea, not partaking of the nature of a plea in any respect, being as to this point, an alleged agreement between the Plaintiff and the other Defendant

(*a*) *Ante*. (*b*) *Ante*.

1805. Shaw v. Ching. [304]

for a share of the profits of the business, a mere negation of the averment in the bill, which, wherever it can be by plea, must be something, that goes to the person; as, if the party is executor, &c., and must be in bar of the whole demand; which is not this case; and the fact, not being in the immediate knowledge of this Defendant, is denied according to his information and belief. The case of tithes has been considered anomalous.

The Lord CHANCELLOR.—Not always. The first case is that upon the tithe of rabbits (*a*). The difficulty of that was, that if the parties had gone to issue upon the cause in Equity, and the cause had come to a hearing, it might have turned out, that no issue would have been granted. They found then this inconvenience, that, if by a *modus* the Defendant set up a defence against setting forth, what titheable matter he had, the party might die before the account could be obtained. Then that case goes on to state the case of the executor, who, though he denies the debt, must answer as to the assets; not of course upon a creditor's bill. When you come to the case of *Child's* shop, suppose, a bill filed by a person, claiming as creditor, and the debt denied; they must either, according to the modern doctrine, have paid the debt, or they must have set forth the account. That case therefore is just as inconvenient as the case of partnership.

In the case of *Gethin* v. *Gale* (*b*) Lord *Hardwicke* is represented to have said, what cannot be, that, if the right is clear, the Defendant shall set forth the account; if not clear, he shall not; and then he adds that exception as to the bill of a creditor or legatee. In the subsequent case (*c*) the Court of *Exchequer* says, that depended upon the fact of legitimacy, as to the right to the account; and in some form the mother swore positively to the legitimacy of the party; and Lord Chief Baron *Parker* is made [305] to say, that, if it was sworn positively, and was in the knowledge of the party, that fact was disproved, that would give the right to the discovery; but he proceeds to say, that if it was not in the knowledge of the party, they would compel the discovery; and they did in that case compel the discovery.

Then followed all the cases before Lord *Thurlow*, not only as to the discovery, but, in what mode it was to be obtained; and that brings forward the other question, whether you may not by a plea bring forward only a negation of the circumstances, stated by the bill. The case of a purchaser for valuable consideration comes very near

Plea, merely a negation of the circumstances, stated by the bill.

(*a*) *Randal* v. *Head*, *Hard.* 18[illegible] (*b*) Cited *Amb.* [illegible]
(*c*) [illegible] *Amb.* 35[illegible]

that. If this doctrine is to be maintained, which is positively asserted in some of the cases, and denied in others, it is necessary to determine, in what form this is to be done. A case of partnership is stated, praying a great variety of accounts, and stating several circumstances of fact. The Defendant does not put in a short answer, or in the effect of a plea of no partnership, but puts in an answer, stating, that there is no partnership, refusing to answer what is inconvenient to him to answer, but answering all that is convenient. Where a party demurs, judgment is had in the first instance; so upon a plea. But if this sort of illegitimate pleading can be substituted, the Plaintiff is thus involved. 1st. He is put to the expence of the judgment of the Master; and the Master is called upon to give judgment in a matter which, with the exception of the case of pain, penalty, and forfeiture, it is not the habit of the Court to entrust to them. 2dly, if the Defendant by plea puts in a single fact, or several facts, constituting one defence, they go to issue upon that; if it is found for the Defendant, the Plaintiff is dismissed: if for the Plaintiff, further inquiry is directed. But in this way, the Defendant answering just what he chooses, issue [*306] cannot be joined upon the single fact, supposed to be the bar; but the Plaintiff, if he replies, must reply to the answer as he finds it, and must go to long, expensive proof, upon a great variety of facts, which is an unnecessary, vexatious burthen, thrown upon him. Lord *Thurlow* seems to have thought that, if a Defendant answers, he shall answer throughout. Whether that is right or not, I am convinced the forms of pleading cannot stand, as they now are, upon the reported cases.

1[illegible]. SHAW v. CHING.

I will read the bill and answer, as I did in the other cases upon this distracted point; for though I must not shrink from it, yet out of respect to those who have differed so much, I ought not to decide it in a case in which it does not arise.

The Lord CHANCELLOR disposed of the exceptions; saying, it was clear this answer did not involve the general point. Dec. 11.

1805.

July 3. [illegible]

FALLOWES v. WILLIAMSON

Abatement by the death of one of the Plaintiffs tenants in common. Bill of revivor by his representative. The survivor, if not a Co-plaintiff, must be made a Defendant. Whether the original Defendant, having had orders for time to answer the original bill, can begin again with the usual course of orders for time to answer in the revived cause, Quære.

THE original bill in this cause, filed by Sermenton and Barlow, tenants in common, praying an account to ascertain a loss that had been sustained by the Plaintiffs, and farther relief accordingly, abated by the death of Barlow before answer. A bill of revivor was filed by his representatives alone, against the same Defendants; [illegible] joining Sermenton as Co-plaintiff, nor making him a Defendant; stating, that the said suit abated by the death of Barlow; that the Plaintiffs in the bill of revivor, as his personal representatives, are entitled to have the same revived; and praying that the said cause may stand revived. The Defendants obtained an order for six weeks time to answer; having had two orders before the abatement [illegible] in the bill of [illegible] an attachment for want of answer [illegible] of the practice on each side [illegible] by the Plaintiffs in the bill of revivor [illegible] and the order for six weeks time [illegible] that the Defendant was not entitled [illegible] orders for time in the revived [illegible] in the original [illegible] by one Defendant, to set aside the order for six weeks and the attachment; contending, that the attachment was irregular, on two grounds: first, that Sermenton, the survivor of the original Plaintiffs, was not a party to the bill of revivor; 2dly, on the order for time obtained.

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Mr Bo[illegible], for the Plaintiffs [illegible].—The Defendant, having had the usual orders for time to answer the original bill, is not entitled to six weeks [illegible] to answer the bill of revivor, as he is attempting in this instance, beginning with an order for six weeks. No time is given to answer a bill of revivor beyond the usual period of eight days.

Upon the other point it is not necessary, that the surviving tenant in common should be a party; but that objection, if it has a foundation, must be taken by plea or demurrer. It cannot be made by answer (a). In Mr

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Wyatt's edition of the Practical Register (c) a case (b) is stated, in which it was held, that, if two joint-tenants or tenants in common are Plaintiffs, and one releases, or dies, the suit does not abate as to the other. According to that there is no abatement as to Sermenton.

Mr Bell, for the Defendants.—In other reports of that

(a) Harris v. Pollard, 3 P. Wil. 348. See [illegible] v. Lord [illegible], [illegible] v. [illegible], and Shaw v. Ching, ante, p. 296, 303.

(c) p. 305. 90 [illegible] (b) [illegible] Ch. Rep. 66.

1805. LAWES v. WILCOX.

[illegible] a note is added, that, though that is true as to joint-tenants, [illegible] not true as to tenants in common, all of whom must join in the bill of revivor, where the abatement is by the death of a Plaintiff, though upon the death of a Defendant the suit is revived as against his representatives only. Until the beginning of the last century revivor was by *scire facias*, which must have been by all the parties with the new Plaintiff. In this instance one of the Plaintiffs, tenants in common, dies; his executor files a bill, praying in general, that the suit shall be revived. The order is, that the said suit and proceedings shall stand revived. The form of the order and the reason of the thing show, that it cannot be [illegible] as to all the parties. Otherwise [illegible] [illegible] himself into the [illegible] [illegible] to proceed [illegible] [illegible] by one party without the other.

Secondly, [illegible] bill of revivor the Defendant [illegible] [illegible] There is no distinction [illegible] between [illegible] [illegible] [illegible] [illegible] [illegible] answer.

Mr. [illegible] [illegible] [illegible] being before [illegible] not answered, [illegible] [illegible] the bill of revivor. [illegible] in this instance [illegible] Defendant to the bill of revivor and to the [illegible] person, it would [illegible] merely for the purpose [illegible] which he had been [illegible] the Court, required to [illegible] [illegible] the suit is revived, [illegible] two or three [illegible] bill, [illegible] not be entitled to [illegible] contrary both to practice and [illegible] [illegible] is regular [illegible] *[illegible] others*, the usual course [illegible] Plaintiff.

The Lord CHANCELLOR.—This is most important to the practice of the Court in many respects. I cannot take as the law of the Court the practice out of a general book of practice, though a very good book, referring to one report, contradicted by another. If for want of authority I am to reason upon general principle, where joint tenants file a bill, and by the death of one the interest survives, without doubt there is no abatement; but the survivor may go on. But where the interest is that of tenants in common, there is prodigious difficulty and

1805 vast injustice in deciding, that if one dies, the representatives of that one may, without making their companion a Co-plaintiff, revive. The first difficulty is of this sort. The Plaintiffs in the bill of revivor suggest upon the bill that they are the representatives, and that they stand in the place of the original Plaintiff. The Defendant upon this argument either is, or is not, at liberty to answer. He certainly may show cause against the revivor in some way. Suppose he does not, and the representatives revive. If the Co-plaintiff with the original Plaintiff, deceased, does not admit, that those persons are the representatives, what is there in the state of the record, so put, authorizing the Court to say, the suit is revived, in that stage, until the surviving tenant in common has done some act acknowledging the relation, in respect of which he and the alleged representative agree, that there is a right to revive? The surviving tenant in common must have some opportunity of doing that. He may state, that he is filing a supplemental bill to bring the real representative before the Court. If he is made a Co-plaintiff, by joining he admits the character of the representative. But suppose, he knows, the other is not the heir, that he is obliged to get on with his own suit, and knows another person to be the heir, without whom he cannot get on: what is there upon the record, where the bill of revivor does not make the survivor a Co-plaintiff, to show, that he admits the character of the Plaintiff reviving?

Farrow v. Whitlock [side-note]

[310]

Beyond that there is another difficulty, and a very mischievous consequence, in holding, that the representatives may revive without the original Co-plaintiff, even if he does admit, that they are the representatives. Circumstances may have taken place, from which the survivor may know, it would be gross injustice for him to pursue the suit: and that the representatives of the deceased tenant in common know that. Suppose they revive, and instead of a plea or demurrer the Defendants state the objection by answer, and insist upon it, as entitling them to the same benefit, as if it had been by plea (a) the cause might go to a hearing, when revived in the absence of the original Co-plaintiff, and he may be engaged, and without his consent, in further litigation, where he thinks it unrighteous; and, if he had been sole Plaintiff, might have desired to have his bill dismissed with costs. In what mode then is he to come, and say he will have nothing more to do with the suit; for there must be some form, in which he shall be at liberty to do so. On the one hand there is great hazard of injustice: whether the alleged representatives are so, or not, and if it was to be

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(a) See the note (a), ante, 13

considered originally, there is vast weight in the doubt, that has been referred to; and upon general principles I should be disposed to hold, that the revivor ought to be by all; for it is true, as has been stated, that upon a revivor by *cestui que trusts* all must join. It would be strange upon a *cestui que trust* to say, the proceedings were to be put in the same plight, not only as to the persons suing it out, and against whom it was sued out, but against persons to whom it was not addressed, and having no knowledge of it.

1805.
FALLOWES v. WILLIAMSON.
Upon a revivor by *cestui que trusts*, according to the old practice, all the Plaintiffs must have joined.

Next, if the representatives are to file their bill of revivor, and that is only as to the interest of the deceased, though that bill states the original cause as the cause of that, must not the two causes be joined, so that the Court can know, in which you are going on? It would be novel, and against the principle of pleading in Equity, that, where the interest is entire as to the subject of the suit, though held in joint enjoyment, and the Defendant might object for want of parties, that the bill of the representatives should revive as to that suit, the interest of the other Plaintiff not being abated; and therefore the two causes must be joined, though the survivor may have no inclination to go on. What is revived? The suit as to the interest of the deceased. But then it must in the contemplation of the Court be a proceeding at the suit of the survivor, as his interest is not abated, and at the suit of the representatives coming in the place of the deceased. The consequence is, all subsequent process must be at the suit of both, and in a cause, entitled in the names of both; and it is very difficult to make out, that the cause of "*Fallowes* and others" is the cause of "*Fallowes*, "*Simmerton*, and others." [312]

My present opinion is, that the attachment is irregular at any rate, as it ought to be at the suit of both Plaintiffs; also, that the attachment in the cause of "*Fallowes* "and others," is not at the suit of both the Plaintiffs, as the name of *Simmerton* does not occur in that cause of *Fallowes and others*. I will have the authorities examined in the *Register's* Book, before I decide the point.

As to the order for six weeks time to answer, it cannot be a waiver for the irregularity, if any, upon the circumstance, that this bill is at the instance of the representatives only, and not of both parties; for it is admitted to be something subsisting. The Defendant must have some time to put upon the record, what is necessary to show, that the persons reviving are not the persons entitled to revive. Where a revivor becomes necessary by the death of a Defendant who has not answered, the Plaintiff must have an answer both to the original bill and the bill of

1805. FALLOWES *v.* WILLIAMSON.

revivor, and though there is a complete answer to the original bill, yet in general cases the Defendant to the bill of revivor may, and in many cases must, answer: for instance, an executor as to the nature and amount of the assets. But it would be very extraordinary, if process against the Defendants, up to the very point of custody, remained upon the record, that the consequence of the death of one Plaintiff, the suit not abating as to the other, is, that the Defendants, though the same identical persons, are to have all the orders for time they originally
[313] had, and even the survivor cannot have the process of the Court, until all the same course of time has run out. The practice cannot possibly be, that, where a Defendant has had all the time, to which he was entitled, and has got into contempt, the death of one Plaintiff purges that contempt as to all the other Plaintiffs, and gives a right to all the orders for time again.

Mr. Hobart, being applied to by The Lord *Chancellor*, said, he had filed several such bills, by the representative merely.

July 20.

The Lord CHANCELLOR.—My opinion is, that the proposition in the books is true, that, where one tenant in common dies, his representative may revive without the other; but it is true only in a qualified sense. He may revive without making the other a Co-plaintiff; but, if he does so, he must make him a Defendant. The case of joint tenants is not in the least analogous. To bring before the Court in the revived cause all the parties, you must have all upon a record, that brings them all together. The consideration in this instance, is, that the representatives of one tenant in common revive. But there is no *consent* to the Court, whether the other Plaintiff means to take any part in the suit, or not. He must therefore either be a Co-plaintiff or a Defendant. The next consideration, which leads to great difficulty, is, that unless that is the rule of the Court, there are two causes, which for the purpose of subsequent process I do not know very well how to put together. There is an attachment in the revived cause, but that does not embrace the original
[314] Co-plaintiff in any respect; and, if you could revive without making the original Co-plaintiff a Defendant, the process must of necessity be entitled in both causes. But that would be error. Therefore the cause is not well revived. The effect of that, with reference to the other

point, as to the time to answer, is, that what has been done in the cause is all wrong in the foundation of it. Upon these principles therefore the attachment is wrong.

1805.
Farrar v. Williams.

CASH v. KENNION.

1805. May 11. Dec. 17.

Debt, contracted in Jamaica, made payable in London. The expense of commission to the agent, remitting the money, falls upon the debtor.

UNDER a bill filed by creditors of John Kennion, an order was made, that his widow and executrix, a Defendant, should account for all sums of money received by the executrix, or by her, or by any other person for her or on her account. In the account she claimed an allowance for commission, retained by the agent of the testator, remitting to *England* by bills, procured in *Jamaica*, money in discharge of bonds, given by the purchasers of an estate in that island, from the testator for the purchase-money, and made payable, according to the contract, upon the Royal Exchange, *London*. An exception being taken to the report, disallowing that claim, an inquiry was directed, whether according to the usage of *West India* transactions the commission for procuring remittances for debts, payable in *London*, was paid by the creditor, or the debtor. An exception was taken by the executrix to the second report, stating, that according to the usage in the *West Indies*, as to which the evidence was contradictory, the commission was paid by the debtor, and was due, even though the remittance was not through the agent, if at his instance.

Mr. Romilly, and Mr. Bell, in support of the Exception. [314]
Mr. Richards, and Mr. Hart, for the Report.

The Lord CHANCELLOR.—The report upon the reference, directed as to the usage, states the affidavits of six or seven merchants in *London*, representing the usage to be, that, though a bond is payable in *London*, the creditor shall allow the commission to the agent, receiving the money, and remitting it, or calling upon the debtor to remit. On the other hand there are affidavits by two persons, attorneys and agents in *Jamaica*, stating, that they have often received and remitted debts, and, where the debt is payable in *London*, the commission, if it is paid, is due from the debtor. A third distinction appears in some of the affidavits, that the creditor always pays the commission, though the debt is payable in *London*; except, where by special agreement the debtor is to pay it. Some of the affidavits attempt to explain, how, where the

1805. agreement is to pay 100*l.* in *London*, the creditor is to hold the contract satisfied, if the debt is paid in *Jamaica*, and the creditor receives in *London* only 95*l.* I do not comprehend the meaning of the reason of that usage, throwing the commission upon the creditor, as it is stated. The question, as a question of law, stands thus: Where a debt is contracted in *Jamaica*, and is therefore *primâ facie* to be paid there, it is obviously reasonable, that, if the creditor lives in *London*, and his agent makes a demand upon the debtor, where he resides, and he there pays the whole, he has paid the creditor, when he has paid the agent, and the expense of the transmission of the debt is between the creditor and his agent; the contract of the debtor being satisfied. But upon a [illegible] made payable in *London*, the creditor is in *London* to receive so much money; and there is no difference [illegible] West India and *Irish* remittances. I cannot [illegible] to doubt, that, where a man agrees to pay [illegible] in *London* upon the [illegible] of *January*, he ought to have that sum there upon that day. If he fail in that contract, whenever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed. The contrary principle would be most dangerous as to *Irish* mortgages. I suppose, the money was made payable in *London* for the very purpose that it should be received without deduction. With regard to the usage, as represented on one side, that though the debt is payable in *London*, yet the debtor can discharge that undertaking by payment in *Jamaica*, and the agent receiving the money, is to make the payment in *London*, deducting 5*l.* *per cent.* from that money, paid to his principal in *London*, that is in common sense a payment in *Jamaica* instead of in *London*.

Case v. Kennion

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July 29. *The Lord* CHANCELLOR.—The first question is, whether, where a bond is given by a person living in the *West Indies*, payable in *London*, and bills are drawn for the payment, if the debtor there pays the money to the agent of the creditor there, that agent is entitled to retain commission, and, if so, whether that is not a commission to be paid by the debtor? The agent of *John Kennion*, in the *West Indies*, had received from the debtor bonds, to pay, upon the Royal Exchange in *London*, bills of exchange for payment of the purchase-money. The agent remitted the money, and the money actually received in *London* was so much less than was to be paid, as he retained his commission. The result of these circumstances is, that the person, who had undertaken to pay 100*l.* upon

the Royal Exchange in *London*, if he remits the money through the agent of the creditor, and does not himself pay the commission to that agent, withholds from the creditor [illegible] *per cent.*, the result of which is, that the debtor, though bound by the contract to pay 100*l.* upon the Royal Exchange, *London*, pays only [illegible] insisted, that this is right [illegible] the agent [illegible] right to deduct the commission. That [illegible] the evidence, produced by the [illegible] directed to inquire into the usage [illegible] admitting that to be usage [illegible] that, though the agent would be entitled to commission, in truth the commission the debtor [illegible] to pay, and not the creditor, receiving the money [illegible] be so, for, if the debtor [illegible] to [illegible] 100*l.* [illegible] and remits that through the agent of [illegible] as for the [illegible] at of the debtor [illegible] him, [illegible] the creditor the whole [illegible] entitled to receive upon the Royal Exchange.

1805. KENNISON v. * 317

After this reference [illegible] I had some doubt as to the propriety of [illegible] the debt ought to be decided upon the written contract [illegible] upon usage, particularly a usage, which [illegible] Upon the meaning of the contract the person, who undertakes to pay, must pay that money without deduction in *England*: otherwise he does not make good his contract. The agent of *Mrs. Kennison* and *John Kennison* having in the *West Indies* received the money payable in *London*, they have allowed to him that, which upon this principle should be demanded against the debtor, not against them, so much *per cent.* upon what he receives. By submitting to the order she has undertaken to account for all sums, received by *John Kennison*, or herself, or any other person for his or her use, and those sums being received for his or her use, and this being a deduction the agent was not entitled to claim from her, she is not entitled to retain it. [318

It occurred to me, that there is no way of getting at it, so as to excuse her from the payment, unless it is to be considered a just allowance, that she is to claim as trustee, or as a case, in which the trustee had acted so much for the best, that she ought not to be charged with a debt, so incurred. But, I apprehend, that will not do; for, if a trustee allows a person to retain a sum of money which by law he is not entitled to retain, though the trustee and that person may have so settled the account between themselves, yet, if the person receiving the money, with that deduction, has entered into an undertaking to account for all money received for his use, the whole sum received from the debtor is received for the use of

1805. that person By the law of the island the commission is due from the person who pays the money, and therefore *Mrs. Kennion* might have recovered it from him. If the agent could have insisted by law upon keeping this commission, she was obliged to pay it. But the agent could not insist upon that, for his duty was to receive the commission from the debtor, and, further, he was bound in law to refuse to receive the money, unless the debtor paid him so much as would enable him to remit to his principal, without expense, that sum of money, which by the contract the debtor had agreed to pay in *London*. Taking it any way, therefore, this allowance cannot be made.

CASH v. KENNION.

The exception to the report was overruled, and the balance ordered to be paid.

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July 22.

BRICE v. STOKES.

A trustee charged, though he did not receive the money, under the circumstances, having joined in the receipt the sale unnecessary, and permitting his co-trustee to keep and act with the money contrary to the trust. (1)

Not charged in respect of the interest of one of the *cestuy que trusts*, having notice of the breach of trust, and acquiescing

BY the decree in this cause an account was directed of the money arising by sale of part of the testator's estates, come to the hands of *Henry Mooring*, *John Fielder*, and *John Sparrow*, the trustees, or their executors, &c., and an inquiry, in what manner the purchase-money was paid, the receipt signed, and in what manner and by whom the interest was paid during the lives of *Mooring* and *Fielder*, and in whose hands the principal remained.

The Master's report stated the will of *John Taylor* devising and bequeathing to his executors, *Sparrow*, *Mooring*, and *Fielder*, their heirs, executors, &c. all his freehold and leasehold estates, upon trust to pay the rents and profits to the testator's niece *Elizabeth Sparrow*, while unmarried, and after her marriage upon trust for her, her heirs, executors, &c., and he gave full power to his said trustees and executors, and the survivors, &c. to sell and dispose of all or any part of the said estates, and directed the moneys arising from such sale or sales to be put out by his said trustees or the survivors, &c. upon government or real securities, and such moneys and the interest and proceeds thereof in the mean time to be applied upon the trusts, before directed as to the estates, and the rents, &c., and he declared, that the trustees, and the survivor, &c. should have full power and authority to

(1) See the note to *Hovey* v. *Blakeman*, ante, vol. iv. p. 596.]

make such settlement of all or such of the estates as should be unsold, and the money produced by the sale, as the said trustees should judge fit, on the marriage of *Elizabeth Sparrow*; to the use of her and her issue, and under such restrictions as his said trustees or the survivors of them, should think fit and proper, and he directed, that his said trustees and executors should not be answerable or accountable for any loss, which might happen, of all or any part of his real and personal estate, so as such loss be not through their wilful neglect or default, and that one of them should not be answerable for the others or other of them, or for the acts, receipts, payments, or defaults, of the other or others of them, but each of them for himself and for his own acts, receipts, and defaults, only.

1805.
BRUCE v. STOKES.
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The report also stated the marriage of *Elizabeth Sparrow* with *Thomas Bruce*, the Plaintiff, in 178[illegible], upon which occasion a settlement was made to the separate use of *Mrs. Bruce* for life, with remainders to her husband, surviving her, for his life, and to the issue. She died, leaving no issue, in *September*, 1781. That settlement also contained a power, similar to that in the will, to the trustees to sell with the consent of *Mrs. Bruce* if living; the receipt of the trustees or the survivor to be a discharge to the purchaser; and forthwith and with all convenient speed to invest the money in their names upon government or real securities, &c., with a declaration, that the trustees, their heirs, &c. should not be chargeable with, or accountable for, any more of the said trust moneys and premises, than he or they should actually receive, nor with or for any loss, which should happen, of the same moneys and premises, or any part thereof, so as such loss happened without his or their wilful default: nor the one for the other of them, but each of them only for his own acts, deeds, receipts, disbursements, and defaults.

The report further stated, that by indentures, dated the 27th of *November*, 1784, it was witnessed, that *Mooring* and *Fielder*, in consideration of the sum of 1260*l*. to them paid, (with the approbation of *Thomas Bruce*,) by *Robert Illington*, conveyed part of the freehold estate to him and his heirs, for which sum of 1260*l*. the said consideration money, *Mooring* and *Fielder* respectively signed a receipt on the back of the deed. No part of that sum was laid out: but some money by way of interest on part of it was paid by *Fielder* to *Bruce*. *Fielder* died insolvent in *April*, 1794, and *Mooring* died in *October* following. [321]

The Master certified, that, though the evidence appeared exceedingly contradictory, yet as the receipt for the 1260*l*. the consideration-money, written on the back of the conveyance, was signed both by *Mooring* and *Fielder*,

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v.
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and witnessed by four witnesses as to the signatures by them, it must be presumed, that they received such consideration money: therefore the Defendant *Stokes*, as executor of *Mooring*, and *Buxton*, the surviving administrator with the will annexed of *Fielder*, ought to be charged with the consideration-money and interest.

Exceptions were taken by the Defendant *Stokes* to the Master's report, for charging the Defendant, as executor of *Mooring*, with the sum of 1260*l.* as having been received by him with *Fielder*, and interest.

The examination of the Plaintiff *Brice* stated, that he was ignorant of the treaty for the sale, except that for the purchaser's satisfaction he joined in the conveyance. *Mooring* resided at *Christchurch*, twelve miles from *Lymington*, where the Plaintiff and *Fielder* resided; the latter being an Attorney. The Plaintiff never received any money from *Mooring*, but received various sums from *Fielder* by way of interest for part of the trust estate. On account of *Mooring*'s residing at a distance the Plaintiff never
[322] applied to him for any interest during the life of *Fielder*, but always applied to *Fielder*, who lived near him.

The evidence as to the fact of the payment was contradictory. *Mooring*'s widow stated, that she was present at the execution of the conveyance; but did not see the money paid to any one. *Fielder* told *Mooring*, it was necessary for him to execute the conveyance, and sign the receipt, to which *Mooring* objected, alleging, that *Fielder* never consulted him in the management of the trust: but *Fielder* pressed him, saying, it was only matter of form, for he should receive the purchase-money, and place it in the stocks for the benefit of the children; and at length *Mooring*, after much hesitation, executed.

There was also evidence, that among *Mooring*'s papers was found an account in the hand-writing of *Fielder*, showing, that the whole of the money was received by *Fielder*, and the greater part invested in securities; and, that by an account, discovered among *Fielder*'s papers, it appeared, that he received the money, deducted 400*l.* for legacies, returning 860*l.*, for which he paid interest to the Plaintiff.

Mr. Romilly, and Mr. Hart, in support of the Exceptions.—Upon the evidence this transaction is much in the dark. The question is, whether from the mere circumstance, that this trustee joined in the receipt, in order to make a title, he ought to be charged personally; and whether he may not discharge himself by showing, that, though he joined in the receipt, the other trustee received all the purchase-money. It was indispensably necessary for the
[323] trustee to join for conformity. The distinction between the cases of an executor and a trustee, though much dis-

cussed, has never been overruled. As it is not necessary for the executor to join, his act in joining makes him liable: but, as it is necessary for a trustee to join, the mere circumstance, that he joins in the receipt, in order to make a title, is not sufficient to charge him, unless you go further, and show, that he actually received the money. 1805. BRICE v. STOKES.

Mr. *Richards*, and Mr *Bell*, for the *Report*.—This is not the ordinary case, but the case of a trustee, voluntarily joining in this sale, for the mere purpose of converting real estate into personal; the personal estate being equal to all the charges, and no purpose to be answered. The nature of the trust called upon both trustees to take care, that the *cestui que trusts* should be as safe, as if the estate had remained as it was. As there was no other object therefore than merely to secure the property for the benefit of the infant *cestuy que trusts*, *Mooring* was bound to see to the application. The signature of the receipt throws it upon him to show, that he did not receive the money. The effect of the distinction is merely, that the Court will more easily believe, that the trustee did not receive the money; but it does not go the length of throwing the proof, that he did receive it, when he has signed the receipt, upon the *cestuy que trust*. The circumstances account for the fact, that the interest was paid by *Fielder*. It was natural, that he, being an Attorney, should be trusted for that purpose. How can this Court infer, that it was not laid out upon security in their joint names; or, that *Mooring* did not receive the whole from *Fielder*? There is no evidence, that can weigh against the signature of the receipt. The paper writing by *Fielder* charges him, admitting, that he received the money: but it does not discharge *Mooring*. To counteract the evidence from the receipt he must produce the most satisfactory evidence, that he joined for conformity only, and is therefore within the indulgence, allowed to trustees. [*324]

Another principle, upon which these trustees must be charged, arises from the deed of settlement executed, under which they are to exercise a discretion, whether it is proper to sell the estate: a most important duty imposed upon them. The will is therefore out of the question. The Court will not after that hear a trustee say, it is immaterial to him, what becomes of the fund. He does not, as he might, give up the trust under the will: but he accepts another trust under the deed, the only object of which was to take care of the property; which is very different from the case of a trust, thrown upon him, and not assumed voluntarily. This is a case therefore of gross and wilful negligence.

1805.
BRICE
v.
STOKES.

Distinction between trustees and executors, in favour of the former, where one, who has not received the money, has joined in the receipt, approved by Lord *Eldon*.

The Lord CHANCELLOR.—It does not appear, for what purpose this sale was made, except for the mere purpose of converting real estate into personal. If the sale was made for a purpose, not authorized by the settlement, *Brice*, the husband, being an executing party, could not complain of that sale. The money must upon this evidence be taken to have been paid to *Fielder*. At Law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him to show, that the money, acknowledged to have been received by all, was in fact received by one; and the other joined only for conformity. In the case of executors it has been said, and well said, to be otherwise. An executor, as it is * not [* 325] necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund, and therefore answerable for the application as far as it is connected with the particular transaction in which he joins. Upon considering the cases, laying down that rule of late, I repeat, what I have said upon a former occasion,(a) that it is much safer for executors to abide by a general rule of that sort, than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds. In this case it was absolutely necessary, that all the trustees should join in the receipt; for the law, empowering the sale, is the settlement, which in principle and terms requires, that the purchaser should not be discharged but upon the joint receipt of all. The money was not in a strict sense received by both trustees: for the weight of evidence is, that *Mooring* let *Fielder*, a professional man, circumvent him a little in taking into his own hands the money, probably upon some confidence, that he would lay it out either in the funds, or such other security as it might be invested in consistently with the settlement, viz. a good real security. It is a clear fact now, that it remained with *Fielder* until his death in 1794.

Two questions arise: 1st, whether *Brice* the husband can complain, with respect to his interest in the produce of this sale, as against *Mooring*? 2dly, Whether those, who are to take after him, can complain? It is clear, upon settled cases, that if there are two trustees and a transaction takes place, in which the fund is taken out of the [326] state, in which it ought to have remained, and is not placed in the state, in which it ought to be, but is kept in

(a) *Ante*, vol. vii. 198.

hands, that ought not to retain it, if any particular *cestuy que trust* has acted in authorizing that as much as the trustee, who has got the money in his hands, and continue to permit it to be so treated, in a question between that *cestuy que trust* and that trustee the latter cannot be called upon by the former. There is very satisfactory evidence, that *Brice* must be considered as having for ten years permitted this money to remain with *Fielder* alone, and therefore cannot complain, as against *Mooring*, that it was not laid out by *Fielder* with *Mooring*. Upon the evidence *Brice* received the interest from *Fielder* alone; having no communication with *Mooring* until shortly before or after the death of *Fielder*; and made no demand upon *Mooring*. He ought to be taken upon the account to know, that as late as 1786 this was cash in the hands of *Fielder*; charged in account, as one of the executors, having that money. There is not one *item* in respect of which he debits himself, that does not expressly name the security upon which the money was out; except the sum of 800*l.*; and then it is no longer interest at 4 *per cent.* but 5 *per cent.*; charging himself with a larger interest, after he received it, than he gave credit for, before he received it. Afterwards from 1787 he proceeds dealing with *Fielder* only; receiving the interest of that particular sum, until 1791. The result of the evidence is, that with *Brice*'s permission this money was suffered to remain with *Fielder* upon his personal security; that, if *Mooring* knew as much as *Brice*, so *Brice* knew as much as *Mooring*; and cannot complain, that this was a misapplication, permitting it with respect to his own interest.

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Mooring also placed so much confidence in *Fielder*, that, though the money got into the hands of *Fielder* alone, it is very difficult to say, as against those who come after *Brice*, that *Mooring* is not to be answerable. This is a sale under a power, but without necessity. This is an act that never could have been done by the mere exercise of the judgment of one of the trustees, enabling him to determine, that it was necessary. There was no necessity, in respect of which the other should join. But though a trustee is safe, if he does no more than authorize the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it is proved, that a trustee, under a duty to say, his co-trustee shall not retain the money beyond the time during which the transaction requires that retainer, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns

1805. BRICE v. STOKES.

upon this, not, whether the receipt of the money was right, but, whether the use of it, subsequent to that receipt, was right, after the knowledge of the trustee, that it had got into a course of abuse. Of that it seems *Mooring* was distinctly informed: the paper, connected with the marriage settlement, stating, upon the face of it, a breach of trust. Though not very intelligible, it shows that an account of the securities taken by *Fielder*, for 1260*l* was put into the hands of *Mooring*. That gave him information, that *Fielder* was lending some of the money upon notes, some upon bonds, and, as soon as a trustee is fixed with knowledge, that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those, who ought to take better care of it.

[328] The conclusion is, that *Brice* cannot call upon *Mooring* as to the interest: but as to the principal *Mooring* is answerable: but he is not to be charged with more than was actually misapplied.(a)

(a) [illegible] *Lord* [illegible] p. 2[illegible] *Manhan*, [illegible] vol. [illegible]

July 22, 23, 30. **BIGNOL v. BIGNOL.**

Order for taxing a bill of costs, entitled in the cause, if obtained by a party to the cause, regular, under the general jurisdiction.

But a person, not a party in the cause, must apply *ex parte* under the Statute 2 *Geo. III c.* 23 s. 22.

Such an irregularity would be waived by proceeding under the order.

Whether a party, having obtained such an order in a cause, may pursue it under the Statute, *Query.*

AN order had been made in this cause, upon the motion of a party in the cause, for taxing a Solicitor's bill. A motion was made to discharge that order, as being irregular.

Mr. Wm. Agar, in support of that Motion, objected, that the order was obtained upon a motion, entitled in the cause, and the application ought to have been *Ex parte*, and cited a late case of *Judd* v. *Howard*.(a) in which that objection prevailed.

The Lord CHANCELLOR.--In the case referred to, the motion was made in a cause by a person who was not a party to the cause. That case is therefore no authority whatsoever against this order; which was made upon the motion of a party in the cause to tax the bill in this cause. That is good within the general jurisdiction of the Court. It does * not signify, that there was business in other matters. Upon this subject there is the general authority of the Court, and the authority under the Act of Parliament.(a) In the taxation of bills the Court frequently

(a) In Chancery, before Lord *Eldon*. (a) p. 329. stat. 2 *Geo. II. c.* 23 s. 2[illegible]

[* 329]

acts under the general authority. A party in the cause may make a motion in the cause: whether he may afterwards pursue it under the Statute may be questionable. But I have no difficulty in exerting the general jurisdiction of the Court. Within that therefore the order is good. This section of the Act of Parliament (b) applies only to the particular case, authorizing an application to a Judge of the Court, in which the business, contained in such a bill, or the greatest part in value, has been transacted; meaning an application in a case where the bill has been delivered, and the party either before, or after, action brought, applies for taxation; and he may apply, though no cause is depending, except that in respect of such bill; or, if there is a cause in Court; but then it is an application founded on this action. The course at Law is, that before action brought the reference is obtained of course; but, if the application is after action brought, the party is put under terms, as to costs, for not coming sooner. But, though this clause relates to applications in this form, and under these circumstances, yet there is a jurisdiction, both here and at Law, much more ancient; and they refer for taxation sometimes *ex parte*, sometimes in causes, applying general principles independent of the Statute, and generally pursuing the equity, with regard to costs, which is stated in the Statute.

1805. Bisson v. Bisson.

This order therefore is not vitious: a party applying in a cause, and obtaining such an order: the case cited being, upon an application by persons not parties to the cause. Another answer is, that I find upon talking to the Judges, that, supposing the order improperly entitled, if the party has actually taken any step under it, the Court will not hear him against it. If therefore he has attended the matter, that is an actual waiver of the irregularity. [330]

It was said, the costs had been taxed.

(b) Stat. 2 Geo. II. c. 23.

1805.

July [illegible].

CROOKE *v.* DE VANDES.

The words "what remains" at the close of a bequest of a specific fund, held a general residuary disposition, the full sense not being necessarily confined, comprising therefore personal estate, bequeathed upon a contingency too remote, not being to take place until thirty years after the testator's death.

Residue bequeathed to two, they take a joint interest.

An agreement for severance as to the whole may be inferred from the conduct, dividing; as the property was received.

[* 331]

EXCEPTIONS were taken by the Plaintiff to the Master's report in this cause:(*a*) first, that the Master has stated, that the sum of 8000*l.* part of the personal estate, invested by the executor on a mortgage, does not constitute part of the residue.

2dly, That the Master does not state, that no act had been done by the Plaintiff and *John Wright* to sever the joint tenancy.

Mr. Richards, and Mr. Hart, for the Plaintiff, in support of the Exceptions, claimed the whole 8000*l.* as the surviving residuary legatee.

Mr. Romilly, and Mr. Cooke, for the Report, upon the second Exception, contended, that the result of the evidence was an actual agreement to divide this personal * estate; for which no deed is necessary: any understanding or agreement generally to divide the personal estate would operate upon this outstanding sum, as the money actually got to their hands; and according to the evidence they did actually divide all the residue, that got to their hands.

The Lord CHANCELLOR.—My judgment upon this will must be mere conjecture. The real question to be decided is, whether there is a general residue given; into which particular legacies will fall? Upon looking into the original will, it seems to be from an after-thought, that a word is said about the residue. The words intimate an intention to dispose of the worldly effects he is intrusted withal: "*imprimis*," &c. A question might have arisen, whether the residuary legatees would have taken the leasehold estate, or the plate, &c. in case of lapse. I have very little doubt, that the testator thought, he had described every subject of property he had, except what is in the last bequest. If the legatees of the different sorts of property, which probably formed the whole substance, except what is comprised in the last bequest, had died in the lifetime of the testator, the question would have arisen, whether under the words "what remains to go to my grandsons," that property would have fallen into the residue. If it would, that must have been upon this ground, that those words had the same meaning, as if he had bequeathed "all the residue." If those words would have embraced those lapsed legacies, they will embrace this

(*a*) Reported, *ante*, vol. ix. 197.

fund, constituted by the preceding clause, by which having before created a great variety of specific and pecuniary legacies, he makes a specific bequest of his ready cash, and rents due to him, stock, and what is *owing to him on any other securities, directing, that such parts as is not upon Parliament security may be first got in, and that his debts, funeral charges, and legacies, shall be thrown upon this part of his property. The words in the disposition immediately following, "what overplus remains" mean the overplus of that aggregate fund, so collected after satisfaction of the debts and legacies. Out of this fund in a certain event 8000*l* is to be given, provided it is legally given. 1805.

CROOKE v. DE VANDES.

[* 330]

With the will, thus expressed, the testator appears to have been originally satisfied, and it had escaped him to make any residuary bequest. The words "what remains to go to my grandsons" appear to have been added afterwards, in a very different hand, and very inaccurate spelling. If those words are read as belonging to that fund only, the fair construction is, that he means to give that fund to them with the deduction of the 8000*l* or not, according to the event. But that construction is not necessary, for unless it necessarily appears, that those words, "what remains," are not to have the full sense, they must have that sense given to them, and there is no right to say, those words do not mean all that the words will carry; which is all that by the effect of the will is not disposed of. Those words are equivalent to the Latin word "*residuum*," and will carry the whole residue, comprising every thing, in the events not disposed of. If the persons, to whom the leasehold estates are bequeathed, or the daughter, who took the plate, jewels, and stock, upon his estate, had died in the life of the testator, these words are large enough to take in every thing, not disposed of, and, that would fall into the residue of the personal estate. That is the best opinion I can give upon this will, but any opinion must be very unsatisfactory.

The other question, as to the severance of the joint tenancy, is mere matter of evidence. It is not necessary to show a specific act of division of each part of the property, if there has been a general dealing, sufficient to manifest the intention to divide the whole. The acts, done as to parts, may be evidence as to the rest, as to which no act has been done. Their division of all the other parts of the estate, is evidence of their intention to divide this, whenever they could lay hold of it.(a) [331]

(a) Jackson v. Jackson, Vol. ix. 591.

1805



LANGFORD v. GASCOYNE.

Rolls. Feb. 27.

Executor, doing any act by which property gets into the possession of another executor, though with an innocent motive, is equally answerable. Otherwise, if he is merely passive. The cestuy que trust barred by acquiescence. (1)

THE bill was filed by a widow, entitled for life, if she should continue a widow, to the freehold and personal estates of her husband under his will, and by his general residuary devisees and legatees, against his executors *Gascoyne*, *Spurrell*, and *Lambert*, for the usual accounts; which were directed by the decree.

The Master, by his report, charged all the Defendants with the receipt of 761*l.* 5*s.* under these circumstances, proved by the affidavit of a witness, stating, that on the 22d of *February*, 1792, the day after the testator's funeral, the three executors met at the house of the testator at *Barking* in *Essex*, and the Plaintiff *Mrs. Langford*, the widow, who was present, left the room to fetch a bag of money, and upon her return with it asked the deponent, to which of the Defendants she should deliver it; and [334] the deponent not then having a good opinion of *Gascoyne's* circumstances, advised her to deliver it to *Spurrell*; upon which she passed by *Gascoyne* and *Lambert*, who were sitting near the door, and delivered the bag into the hands of *Spurrell*, who counted the money over, and then delivered it into the hands of *Gascoyne*. The witness further stated, that at that time *Gascoyne* was not reputed to be in good circumstances.

The Defendants *Spurrell* and *Lambert* took exceptions to the report. The answer of the Defendant *Spurrel*, stated, that he did not know, that he took and counted out the money; but it was laid upon the table, and counted out, and afterwards *Gascoyne* took it up, and carried it away.

Mr. Romilly, and Mr. Roupell, in support of the Exceptions, referring to *Bacon* v. *Bacon*, (a) and *Chambers* v. *Minchin*, (b) contended, that none of the cases went the length of charging one executor, merely as having seen another receive the money; and that it is impossible to go upon the circumstances stated in the report, which would make it depend upon such an accident as who sat nearest to the door.

Mr. Richards, and Mr. Leach, for the Report, insisted, that upon the result of the evidence, *Spurrell*, having received the money, and delivered it to the other executor, must be charged. This executor, having taken upon

(a) *Ante*, vol. v. 331.
(b) *Ante*, vol. vii. 186. *Lord Shipbrook* v. *Lord Hinchinbrook*. *Brice* v. *Stokes*, *ante*, {p. 252. 319.}

{(1) See the note to *Hovey* v. *Blakeman*, *ante*, vol. iv. p. 596.}

himself to act, having once had the money in his possession, and having delivered it to the co-executor, whether with a view to give him any advantage, or from * misplaced confidence, must be answerable, and is within the reasoning of Lord *Thurlow* in *Sadler* v. *Hobbs* (a). 180[illegible]

GASCOYNE. [* 23[illegible]]

The Master of the Rolls.—The question is, whether the money is to be considered as so far in the possession of this executor, that he is to be answerable for what afterwards becomes of it. It is true, this is not a payment to him by any debtor to the estate. It is no more than that, examining the repositories of the testator, they had found this property, and the executor had taken it, and afterwards delivered it to *Gascoyne*. That is the way, in which this case is to be considered. But in fact it is in his possession, and according to the evidence it is put in his possession, by selection of him, as the proper person to be intrusted with it in preference to *Gascoyne*. The doubt intimated by the witness as to *Gascoyne*, was not known to *Spurrell*, but it weighed with the widow in delivering the money. The rule in all these cases is, that, if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other: not where an executor is merely passive, by not obstructing the other in receiving it. But if the one contributes in any way to enable the other to obtain possession, he is answerable, unless he can assign a sufficient excuse, as there was in *Bacon* v. *Bacon* (b), a justifiable object.

In this case *Spurrell* chooses to part with this money, of which he had the possession: probably from an innocent motive; thinking *Gascoyne* more fit to be trusted with it than himself, or the other executor. But in most of these cases, where executors were charged, the motive was innocent, only the result was unfortunate. I feel very great reluctance to charge an executor in such a case: but it is impossible, without breaking through the rule, not to say, he has exercised an act of judgment and discretion: an act of selection by putting the money into the hands of *Gascoyne*, rather than the other executor, or keeping it himself, depriving himself and the other executor of any control over it. He did that act, and the loss is the consequence. This is a very hard case; but so are all these cases.

As to the other executor, *Lambert*, it is impossible to charge him. He has neither done, nor said, any thing, that in any degree contributed to the loss of the money, or to its getting into the hands of *Gascoyne*. It is not in-

(a) 2 *Bro. C. C.* 114. (b) *Ante*, vol. v. 331.

1805. cumbent upon one executor by force to prevent its getting into the hands of another In that respect, therefore, the report is wrong: but as to *Spurrell* the exception must be overruled.

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For the *Defendants*, it was then urged, that in the late case of *Bruce* v *Stokes* (a) the tenant for life was bound; though not those in remainder, upon the circumstance, that the tenant for life knew, the fund was in the hands of the particular executor: The Lord *Chancellor* holding, that acquiescence would bind the *cestuy que trust*

The Master of the Rolls said, the fact was not distinctly before the Court, or he should be very much disposed to let the widow bear the loss, approving the rule, as laid down by The Lord *Chancellor* in *Bruce* v *Stokes*. It was [337] then urged, that the executor, who had not had the money, could not be charged with interest, and on the other hand, that *Gascoyne* must necessarily be charged with interest, this was a breach of trust, and there was no difference between receiving it himself and paying it over wrongfully.

The Master of the Rolls.—Has it been pressed to that strict legal consequence? That certainly is the strict legal consequence If this had been an admitted joint receipt, it would have been of course to charge interest. The question is, whether this is not the same thing?

July 13 The order was pronounced, charging *Spurrell* with interest. Afterwards the cause was sent back to the Master, to review his report; as charging all the three executors, though upon the evidence *Lambert* had no concern in the transaction, except that he was present: the consequence of which was, that *Spurrell* could not have the benefit of his testimony.

(a) *Ante*, [p 319]

1805.

Jan. 20, 21.

WHITE v. FOLJAMBE.

THE bill prayed the specific performance of an agreement for the purchase of a leasehold house in *Lower Brook* street from the Plaintiff, for the sum of 6050*l*. The Plaintiff's title, described as an interest for fifty years, the residue of a term, free from all encumbrances, * appeared upon the abstract to be the residue of a term of years, granted by Sir *Richard Grosvenor* in 1722, to expire in 1820, and a reversionary term from that time for thirty-four years, granted to the Plaintiff in 1791, by the trustees of Lord *Grosvenor*. To this title two objections were taken by the Defendant: 1st, that the right of the lessors to make the reversionary lease of 1791 should be made out by deducing the title of the fee simple from the early part of the abstract to the date of that lease, viz. from Sir *Richard Grosvenor*.

Whether, without express stipulation, a person, engaged under a contract with a lessee for years to purchase the term, can insist upon a production of the lessor's title, and whether the lessee can compel such production, *Quære*.

2dly, That by a deed of bargain and sale, dated the 5th of *April*, 1795, between Lord *Grosvenor* and the trustees, it appeared, that several freehold and leasehold estates, including the premises in question, were by indentures of lease and release, dated the 1st of *April*, 1777, charged with several rent-charges, jointures, mortgages, and encumbrances, and a provision was made by the deed of bargain and sale, by a sale of part of the premises and otherwise, for exonerating certain premises from the encumbrances; and it did not appear, that the premises had been discharged, or the premises, contracted for, released.

The lessee's bill for a specific performance dismissed, his interest, described as fifty years, the residue of a term, free from encumbrances, being a few years only of an old term, and a reversionary term, from another lessor, and old encumbrances not shown to be discharged.

The Master's judgment being against the title, the Plaintiff took exceptions to the report.

Mr. Richards, Mr. Romilly, and Mr. White, for the Plaintiff, in support of the Exceptions.—The lessee has no [* 338] power, especially after the lease has been executed, to call upon the lessor to produce his title. Such an attempt was never made before. The lessee cannot by any process compel the production. If that is necessary, it will be impossible to make a transfer of such property. From [339] the nature of the contract between lessor and lessee, the latter not being entitled to look into the title of his lessor, is entitled to pass his interest without producing that title to a person, who knows, he is taking a leasehold estate. That is a condition imposed by the universal practice upon property of this description; the proprietor of which is bound only to give such title as he has: the presumption being, that the contract is to take the property in the only manner in which the vendor can give it. The only case upon the subject is *Mackreth* v. *Waring*. Previously

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to that case the practice of conveyancing was never to inquire beyond the lease; and the general silence is the strongest evidence of the general opinion and the judgment of the profession. Suppose the lessor had once produced his title, and satisfied the lessee: is he, whenever his curiosity is excited, or whenever a contract is entered into to assign, to bring the lessor into the Master's office, and compel him to produce his title? A distinction may be attempted, where any incumbrance can be pointed out: but that must be decided upon the same practice. Suppose, old mortgages are shown, or a term for raising portions: in a sale of the fee-simple they must be shown to be discharged; as that can be done. But a lessee cannot show, that they are discharged; and has no right to call upon his lessor to show that. If any inconvenience had appeared in the transfer of leasehold property without this production, the Legislature would have interfered.

The Lord CHANCELLOR.—Do you carry it to the extent that the Defendant could not be permitted to show you have a bad title?

For the Plaintiff.—That depends upon circumstances: for instance, suppose a contract for a lease of *Black-acre*

[340] from Lord *Grosvenor*; and they could show, that Lord *Grosvenor* had no estate in those premises. Upon all great estates there must be terms to secure portions, jointures, &c. encumbrances which would affect the leases. The most important consequences must follow the decision of this point against the vendor. To what extent is it to go? Consider the case of a great estate, with a great number of leases upon it. Is the lessee bound to show his lessor's title, notwithstanding he has been uninterrupted in his enjoyment? If he is, though the maxim of Law is, that a man is not bound to do what is impossible, that cannot be said to be a maxim of Equity. In the various instances of bills for the specific performance of an agreement, as to a lease, the question, whether the lessor could grant the lease, has never been made. The reason is, that, when a lease is made to a man, his executors, administrators, and assigns, in the terms importing his power to assign, that has been considered sufficient, as long as he remains in quiet uninterrupted enjoyment. In this case it is not necessary to carry the proposition to this extent, that the purchaser is to take a lease, merely on the ground, that the vendor has got one; for this is a case of uninterrupted possession and enjoyment under this lease: a case peculiar in its circumstances: a lease in 1722, to expire in 1820, and a reversionary term from that time: both under the same family: no suspicion upon the title.

Mr. Piggott, Mr. Alexander, and *Mr. Thomson, for the Defendant.*—The consequences of the decision of this question must be laid out of the case. The question is, whether your Lordship will absolve this Plaintiff from the performance of her contract. The proposition goes this length, that the purchaser is not at liberty to show, there is no title to that, for which he pays his money: for the consequence is, that nothing more is to be exhibited than the lease, and nothing else is to be attended to. That may suit the convenience of noble families; but the question is a question of right. Where is the difference in principle [illegible] between the contract for the freehold and for a lease? In the one case as much as in the other there is a contract. It is said, the Court is to presume every thing in favour of the title from the possession, uninterrupted. But the objection goes not to the original lease still in existence, but to the reversionary lease, to commence fourteen years hence. Though no authority could be produced, the principle will decide this question; which is simply, whether a person, who has undertaken to make a good title, shall be absolved from that obligation. But the case of *Mack*[illegible] v. [illegible], directly supports the objection. 1805. Ware. [*341]

There is nothing to prevent a lessee from contracting for the means of exhibiting his title, if he chooses to take it to market. If the purchaser has the means of showing a reasonable, *primâ facie,* case of objection, can the vendor refuse to make any answer? That is the proposition assumed. Suppose notice received from a paramount mortgagee not to take the lease, could not that objection be made, and could the vendor refuse to answer it? It is not necessary for this purpose to decide, that a lessee in the ordinary case has a right to come into Equity, and compel the lessor to produce his title; but, if that question should arise, the proper decision would be, that the lessor is bound to do every thing to sustain the title of his lessee, and among other things for that purpose to produce his title. To decide this case it is not necessary to lay down a general rule; but if the Court was driven to that, much the least inconvenience would follow from a general rule, that a person holding leasehold property is bound, if required, to show, that he holds it under a good title. Parties may, if they choose, contract to give only such title as they have; and that would be a case of exception. But it would be monstrous to lay down generally, with reference to this description of property, that the purchaser has no right to ask the vendor, whether he is entitled to the property he contracts to sell. The only effect will be, that a lessee, unless he has an express stipulation, shall not have a specific performance. This de- [*342]

1805. White v. Foljambe.

cision will not create any difficulty in disposing of this species of property; and there will be no inconvenience in producing greater caution. Though the habit of conveyancers for a considerable time has been to insist upon these inquiries, if any ground for suspicion has been laid, yet that practice has not prevented this loose mode of contracting without proper stipulations.

Mr. Richards, in Reply.—This is not the ordinary case of a purchaser, but a case *sui generis*. The purchaser may contract specifically, that he will not take the lease, unless the lessor will discover his right to assign it. This Court will not, as between lessor and lessee, compel the lessor to do any thing to defend the title, which the lessee cannot dispute. The only covenant the lessor could be compelled to give is a covenant for quiet enjoyment. The lessee has no right to call upon the lessor to produce his title; for the only title the lessee has is that single covenant; yet he is to the extent of his interest a purchaser. The distinction is obvious between the sale of an estate and the grant of a lease. If an acre is sold, the vendee would have a covenant to produce the title deeds.

[343] The consequences of the doctrine, which this objection goes to establish, will be ruinous; and the inconvenience the other way is comparatively nothing. They go upon the presumption, that incumbrances, existing several years ago, still exist. The lessee has no means of showing any thing upon the subject. The Court cannot presume, that those incumbrances exist now. The Defendant must show that; and is not entitled to call upon the Plaintiff to go into, or explain, the title of the lessor. The case, where it can be established by extrinsic proof, that the lessor had no right to grant the lease, will, when it arises, require great observation; but this is not that case. The principle, adopted by Lord *Rosslyn* in *Pope* v. *Simpson*, (a) applies to this.

Assignees of a Bankrupt contracting to sell, bound, as other persons, to make a good title: but in special cases, as, if they contracted, supposing they had a good title, the parties would be left to Law.

The Lord CHANCELLOR.—I never knew the principle of that case. Previously to that decision I always said, and I say now, that, if Assignees of a Bankrupt agree to sell, they agree to sell with a good title. There may be special cases; as, where they enter into the contract, supposing they have a good title, the Court would stand neuter, and leave the parties to Law, according to the course of the late authorities.

July 26.

The Lord CHANCELLOR.—In the course of the argument of this case propositions of great importance certainly

(a) *Ante*, vol. v. 145.

have been discussed, and were contended even to this length, that, if I agree to take a lease for twenty-one years, or a building lease for ninety-nine years, with a covenant to lay out money, or subject to a ground-rent, paying a large, gross, sum, according to the principle of this Court, and the practice of conveyancing, the person agreeing to take a lease in that simple case has no right in Equity to tell the lessor, before the contract shall be specifically performed, he shall show, he has a title to make the lease. It is argued upon the ground, that, after the contract is executed, it is not competent to the lessee, if evicted, to do more than to take such remedy, as under the covenants, to be contained in the lease, he could have. The present case does not require me to give more upon that, than that I think there may be a very wide difference between, on the situation of a person, who has thought proper upon his own examination of the lessor's title, or not examining it, or bargaining for indemnity, has been so foolish as to execute, and what a Court of Equity will do with reference to the specific performance of an agreement for a lease not yet executed.

1805.

White v. Foljambe.

[illegible] [*344]

Another proposition has been stated. If a person becomes lessee, from that moment he is certainly concluded from disputing the title of his landlord, and it is said, that he has no right, and unquestionably he has no right, for the purpose of enabling him to dispute it, to call for the production of any of the title deeds: that the inference is, that if a person, possessed of a term for years, thinks proper to offer that term to sale, unless there are some specialities in the terms of the contract, the meaning of such an agreement is, that the vendee shall take the title of the vendor, whatever it is, and however it is; the vendor has nothing to do but to produce the instrument of demise, and to show by tracing the title from the original lessee to himself that no ejectment has been brought upon that title by the original lessor or the mesne assigns. This has been compared to a case, which I shall shortly notice, in order to enter my protest against the doctrine contained in it, if it really does contain any such doctrine, as is represented: the case of *Pope* v. *Simpson* (a). That Assignees under a Commission of Bankruptcy may sell under a special contract such estate as the Bankrupt had, I admit. But, if the Assignees exhibit to sale a freehold estate of inheritance, not marking by the contract, that they mean to sell nothing more than it shall turn out the Bankrupt had, they

Lessee cannot dispute the title of his landlord.

[*345]

Assignees of a Bankrupt contracting to sell an estate generally, bound, as other persons, to make a title to the whole estate [illegible] but, if it appear before the contract executed, that [illegible] would be left to Law

(a) 5 Ves. 145.

1805. Wain v. [illegible]

agreement is to sell the inheritance, free from incumbrance, and, (I except a lease, which falls within this case,) there is no principle which can protect the Assignees, if they do not inform themselves, before they propose a sale, what is the real nature of the title. Proposing an estate in terms, which, if used by any other person, would be taken to tender a freehold estate of inheritance free from incumbrances, they cannot say, that is not what they meant to tender. I agree to that case, if it means only this; that, if they offer to a purchaser a freehold estate, free from encumbrances, and before the contract executed it appears to a Court of Equity, that the Assignees cannot make such title, the Court of Equity ought to leave the parties to Law. The Assignees, when they make a title, only covenant, that they have not encumbered; but that does not prove, that they did not mean to sell the fee-simple; and they are only in the same situation as other persons, who, having tendered a fee-simple to sale, find, they had been mistaken in the title; and in that case the Court would only say, they should be left to Law. The proposition is very difficult, that, where Assignees of a Bankrupt expose to sale an estate of inheritance, they are not bound as diligently to inform themselves of the title, and bound by the contract, as

346 much as any other trustees. But that case does not govern this: that being the case of persons, supposing themselves entitled to a freehold estate of inheritance free from encumbrances, proposing to sell: this the case of a person, supposing herself entitled to a leasehold estate; and the contract of such a party is always with this qualification; that, whatever are the terms of the contract, the party means to propose a leasehold estate, evidenced to be held by a good title, so far as the deeds, the production of which the party has the power of compelling, can prove it a good title.

This, as a general question, is most important. The proposition is very intelligible, that a person intending to sell a leasehold estate, may inform mankind, that he means to sell such interest as he has; and the person, proposing to buy, may refuse to contract unless the vendor will show, not only the term, and, that it is free from encumbrance, but also, that the lessor had an estate, out of which the term could be carved. It is for future consideration, whether the best decision would, or would not, be, that in the former case the vendor should expressly say, he means to sell only what he has; or, if a further examination of the title is required than according to the general course of dealing with lessees, it should be upon the lessee; or, whether, considering the nature of the subject, and estate, and the infirmity of the lessee's title

to call for the production, it ought *prima facie* to be understood in a Court of Equity to mean only a good title, shown by deduction from the first lessor, and without incumbrance in the mean time; and, that is all that is to be the subject of the contract. But, if ever it should be my duty to decide a question so important, I will not leave mankind to speculate upon my judgment, I alone can give; but I will have the best assistance upon such a [317] point; for I can hardly estimate the consequences of Law on either doctrine.

1805. White *v.* Foljambe.

When this doctrine is laid down generally, as applied to all purchases of terms, is it intended, that if a term is created, to commence *in futuro*, and of which possession has never yet been had, or a term is granted, which has yet the title of the lessor not five days old, in all circumstances, the mere production of the instrument of lease with a title shown under that from the lessor, is conclusive, not only as the ground of action upon the covenant, but upon a claim of specific performance in Equity? If that is so, such a contract without guarding against the consequences is most improvident: and when it is said, great mischief may result from a contract for the assignment of a lease, as to the term, by leaving it doubtful, whether the lessor's title is good, I feel that; but on the other hand, if it is once established in Equity, that under all circumstances, (excluding special contract,) with reference to possession, as evidencing title, or the want of it, as evidence, that the title is infirm, or whether the lease is in possession or reversion, and whether the lessor is, or was not, in possession, this is to be the meaning of such a contract, from the moment that is laid down in Equity it is precisely the same thing, as a notice in every proposal for the sale of a leasehold estate; and the world must understand that to be the meaning of the contract, unless there are special terms. The mischief therefore is done the moment the principle is laid down in a Court of Equity.

As to the point, when it may be necessary to decide it, how far the lessee can call for a production of the deeds of the lessor, it will be necessary to look out, that, before the general reason, that he cannot call for that production, [318] can be shaken, if it ever can be shaken, It will be necessary to look back to the oldest cases, to be traced from the case of feoffment with or without warranty, before we can say, what should be the doctrine of a Court of Equity, with analogy to the Law.

But it is not necessary in this particular case to decide any of these points. I shall state the grounds, on which I decide this case; which has great ingenuity. It is necessary to attend, first, to the contract; in the next, to the state of the interest of the vendor in the property.

1805. WHITE v. FOLJAMBE.

the rather, as, if the doctrine of Equity ought to be in the ordinary case, that a person, contracting to buy a leasehold estate, is to take it with such title as the lessee may happen to have, it is absolutely necessary, attending to the consequences, that the purchaser should at least know accurately, what he is buying, and, that he buys nothing, that can subject him to more inconvenience than belongs to that doctrine. For instance, the vendor representing himself as having the residue of a term, fifty years, and proposing to sell that residue, if such be the doctrine of Courts of Equity, the difference is wide, whether the purchaser is to take an assignment of one term for the residue, fifty years, of a lease, that has been existing a century, with possession under it, buying therefore an interest for fifty years, the remainder of a term of one hundred and fifty years, where the evidence of the lessor's title is an instrument executed, and actual enjoyment under it for a century, or is called upon under all the inconvenience, belonging to the execution of a contract for the assignment of a lease, to take not such a residue of an old term, but a small remnant of an old term; and, instead of having the remaining years parcel of the same term, under the same instrument, is called upon to take another term, not from the same lessor, from persons not appearing [349] upon the face of the instrument ever to have had possession; whose possession he cannot by his own inquiries recognise, and the interest for fifty years, beyond the parcel of the old term, is to be made up by showing, that the lessee has a reversionary interest in the same estate, not granted by the same lessor. But it is said, that lease is granted by persons, having title from the same lessor. That argument, however, is urged by those who dispute the right to see the title of the lessor: insisting, the purchaser must take the title of the lessee, such as it is. The effect of this doctrine is very different, where the residue of an old term may be represented to be the sole object of the assignment, for there is a great difference between a purchase of a lease from the first lessee, with a covenant, that he has not encumbered, and a lease, that may have gone through forty assignments, with a covenant, from each of those assigns, that they respectively have not encumbered. The value of the interests therefore is very different.

I do not criticise upon the expression "the term," as showing that only one term was intended. The words "free from encumbrances" may mean either upon the Plaintiff's interest, to be sold, or otherwise considered. "Encumbrances," as applied to the ground-rent, is strictly created neither by the lessor nor the lessee; but by both; for it is the render, by the contract, creating the lease,

1805.

WRIGHT v. FOLJAMBE.

reserved to the one party from the other. The Plaintiff, stating the title thus generally, specifying none of the particularities belonging to it, and proposing to perform the contract, and to make a legal assignment for all the residue of the term for years to come and unexpired therein, I do not say, in a sense that may not include leases in possession and reversion, leases under very different titles: but that is not the natural import, which is one term in possession: not two terms, one in possession, the other in reversion. [350] Upon the authorities, *mesne* assignments, which could not be produced, would be presumed, even at Law: to make good the title to the residue of the old term. The nature of the Plaintiff's interest as found, is the residue of that term, and a term in reversion, for thirty-four years, made by persons, who do not appear upon the instrument to have deduced their title from Sir *Richard Grosvenor*, the first grantor: whatever the fact may be, which is important, as the moment you inquire into the fact, you go into the title. The same evidence, that proves, the grantors did derive title from him, proves that it was subject to encumbrances, that would affect the inheritance, out of which the reversionary term was carved.

To make a good a title to the residue of an old term, mesne assignments, which cannot be produced, will be presumed, even at Law.

Upon the particular circumstances therefore this is not the case of a proposal to buy the residue of an old term; the possession under which is evidence of the title, both of the lessor and lessee: it is not the case of such a lessor, even himself granting another term in other premises, or a reversionary term in the same: but the vendor proposes to make the contract good by offering the residue of a term as old as 1722, with possession, and the addition of a lease of the same premises, under which there has been no possession, and could not be: unless it could be shown, that the possession under the first lease ought to be connected with the second, as evidence of title, which never can be shown, unless they show a transmission of the inheritance from the lessor of the first lease to the lessors in the second. This is not a contract for any thing but a particular number of years, the residue of one term, and in discharge of that contract the Plaintiff has offered, not fifty years, the residue of one term, but an entire reversionary term, and the residue of one in possession; both relating to the same premises; [351] but granted by different persons, the connexion between whom can never be shown but by evidence. This is a case therefore of exception out of that rule, if it is a rule that has been insisted on, for the instruments, produced by the assignor, go to destroy each other: until she introduces evidence to make them consistent, the one instrument asserting the inheritance to be in one person,

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An old encumbrance to be attended to, unless it can be presumed, that it does not exist.

the other asserting it to be in others, which must be shown to be derived from the first: otherwise *prima facie* it is not to be so taken: and the evidence, introduced to prove that, shows, there are encumbrances upon the inheritance, prior to the date of the first lease; which therefore may be affected. It is said, these are old encumbrances. I have not been able to find out the principle, upon which an encumbrance can be represented as too old to be attended to, unless it can be presumed, that it does not exist. That is the answer. But, if it is shown, that there were encumbrances, which may exist, am I nevertheless to carry this contract into execution at all hazards: or ought I not to leave such parties to Law? Upon the specialties of this case, the assignors themselves have been obliged to raise up evidence of the existence of the encumbrances. But further, supposing the Law to be, that, when a lessee enters into a contract for the assignment of his term, he undertakes only, that he used diligence in obtaining his lease, had possession since under it, that he can show the *mesne* assignments, and that no encumbrances have been made since, it is one thing to say in a Court of Equity, that by reason of the nature of his estate, and the imbecility of his claim to a production of his lessor's title, that is all he is *prima facie* to be put to do, to make good his contract: but if the purchaser has the means of showing, the lessee has really no title, or, that it is encumbered, I should hesitate long, before

[352] I should say, it was not competent to the assignee, proposing to deal honestly, to show that; and would not in Equity specifically perform such a contract, being convinced, the subject of it was worth little or nothing. If such be the rule as to the production to be made by the assignor, and evidence of such a nature was produced by the purchaser, my conclusion would be to let the assignor make what he could of it at Law, but not to give a specific performance.

As to the second exception, upon the particular and special circumstances of this case, these encumbrances are, with reference to this particular title, encumbrances that I am bound to look at; without giving any opinion, what would have been the case upon a simple bargain for the assignment of the residue of a term of fifty years, nothing being produced but the lease itself, and the fact of enjoyment under it since 1722. The case therefore is at present against the Plaintiff.

The exceptions were overruled; and the bill was dismissed without costs.

1805.



STENHOUSE v. MITCHELL.

July 26, 27.

Bequest of the debts, that shall be due at the death of the testator by mortgages, bonds, or open accounts from certain persons, extended from the explanation of a similar bequest by another clause to debts of every description: therefore including judgments.

H. M. JONES by the 10th clause of his will made the following disposition:

"I give to the eldest son of my late nephew *Alexander* "*Innes* and of *Janet Sharpe* the mother, all the debt* which "shall or may be owing to me by the late *John Crawfurd* of *Bellfield* estate in *Jamaica* on the 1st day of "*January* 1794 say 1794 whether by bond mortgage or "open account to the sole use of my said grand-nephew "subject to his paying to his brothers I think there are "two of them one hundred pounds each during their "lives or only fifty pounds I mean yearly in case such "debt does not exceed eight thousand pounds sterling or "that his two brothers shall be entitled to one-fourth "part of the yearly interest at 5 *per cent* on whatever the "sum or debt may be owing by *Bellfield* estate."

11th clause:

"I give and bequeath to my nephews *John* and *Alex-* [*353] "*ander Stenhouse Alexander Hart* and *James Innes William Innes* and *David Innes* to all or only such of them "as may be alive at my death the debts that shall or may "be due and owing to me at my death whether by mortgages bonds or open accounts by *James Campbell* of "*Duan Vale* or his brother *John Campbell* of *Spotfield* estate also by *Thomas Joseph Grey* of *Someston* and *Eastham* estates also by *Hugh Barnett* deceased of *Sportman's Hall* &c. estates in *Jamaica* subject to the pay- "ment of 5 *per cent* interest upon the sums owing by "those estates to be ascertained at the day of my death "for the term of ten years and then to cease."

A subsequent clause was thus expressed:

"I give all the debt which shall be owing by the late "*John Crawfurd* of *Bellfield* estate at the 1st of *January* "1794 which I now alter to the 1st of *January* 1796 sub- "ject to the said eldest son of the said *Alexander Innes* "now *Thomas Innes* to whom that debt is given on his "paying to his two brothers one-fourth part of the inte- [354] "rest of the sum such debt may happen to be at my death "at the rate of 5 *per cent* during the lives of both or only "one of such brothers."

Upon a rehearing of the decree, pronounced by Lord *Rosslyn*, upon the 19th of *July*, 1800, one objection was, that the decree had not declared, that the Plaintiff and the other legatees under the 11th clause of the will were entitled only to such debts as were due upon mortgages,

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bonds, or open accounts: some debts being due by judgment, and otherwise than according to the terms of that clause.

Mr. Romilly, and Mr. Leach, for the Petition of Rehearing.—Upon the words of this clause can the testator be said to mean debts of every description? If a man, having estates in the Counties of *Middlesex*, *Surry*, *Kent*, and *Essex*, devised the estates, of which he was seised, "whether in *Middlesex*, *Surry*, or *Kent*:" could it be contended, that he meant estates of every description? This testator being entitled to debts of every description by mortgage, bond, judgment, simple contract, stated, and open, account, the cases have a close analogy. The sense of the word "whether," as it is used in this clause, is "*either*:" but if debts of every description were expressed, "whether" would have been the proper term. That word also may be treated as redundant, and cannot control the clear intention. To support the other construction the words "or otherwise howsoever" must be inserted. and then the whole phrase "whether by mortgages, bonds, or open accounts" would be redundant.

[355] *Mr. Piggott, Mr. Alexander, Mr. Roupell, and Mr. Cullen, in support of the Decree.*—The intention upon these different clauses of the will must be taken to be, that all the debts should pass. The difficulty arises from the enumeration: but, to sustain the construction of these legatees, the word "whether" must be struck out. This enumeration was made, not with a view to confine the generality of the bequest, but from caution, that nothing should escape. Upon the other construction the bequest as to *Barnett's* debt, being a large debt by judgment, must fail entirely. As to the nature of these debts, however, though judgment has been recovered in the *West Indies* upon a bond, an action may be brought in this country upon the bond, as for an original debt, without referring to that judgment, which could not be pleaded to that action; *Walker* v. *Witter* (a).

Mr. Romilly, in Reply.—The Court will not against these express words conjecture, that all the debts were intended to pass. Some of the debts due from *Barnett* were judgments upon bonds, and one a judgment upon an open account. If the former can be represented as still remaining debts upon bond, the latter could not continue upon an open account. But after judgment recovered in the *West Indies* upon a bond, there is no authority, establishing, that an action can be brought here upon

(a) Dougl. 1.

the bond, as an original debt, without referring to that judgment. The case in *Douglas (b)* is not an authority for that. The Courts of this country will take notice of the judgment of another Court: as they will of proceedings in a foreign * country in the nature of a Commission of Bankruptcy. The consequence would follow, that if in the *West Indies* damages were recovered in an action for an assault or a libel, another action might be brought here for the same cause, and that judgment could not be pleaded.

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The Lord CHANCELLOR.—When I directed inquiries in this case, I had a strong and decided opinion, that the testator intended to give all the debts, that should be due from these persons, but, that he had used words, that would not authorize the Court to give that judicial construction; but would compel me, whatever the intention was, to confine the bequest to property, actually due upon mortgage, bond, or open account. I am still of that opinion, so strongly, that unless I had the authority of the testator himself from the will against that, it would be very difficult to persuade me to enlarge it. But upon the subsequent clause, with reference to the debt in the tenth clause, the testator himself has said, that when he gives debts, whether due by mortgage, bond, or open account, speaking of debts due by estates, he means all the debts those persons, whom he names, shall owe him at the period, to which he refers: in that clause 1794 and 1796; and in the other at his death. That is the safest construction; for though at the date of his will considerable sums were due to him from those persons and their estates, he has framed his will so that he does not dispose of those, which were due to him at that time, but, if due at his death, they would have passed, and, if those debts had been paid off, and an interval of ten years had elapsed from the period of their discharge, and new debts had been contracted, those new debts, though probably he did not intend it, would clearly have passed by the will, if due upon mortgage, bond, or open account. An inquiry into the actual nature of the debt at the date of his will is not very conclusive, when the effect might be to pass, not any of those, but future debts. [357]

But it strikes me thus: any construction which the testator has put upon his own words in the tenth, is the construction I am authorized, at least, if not required, to put upon the same words in the eleventh article. One im-

(b) *Walker* v. *Witter*, *Doug.* 1.

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Whether action lies upon a bond, on which judgment has been obtained in Jamaica, Quere. (1)

portant question has been mentioned: whether, if a bond has been given with judgment in *Jamaica*, the party may afterwards sue upon the same bond here? But the true question here is, not whether a judgment puts an end legally to the bond-debt; but, whether the testator meant that debt, secured by bond, though a judgment was afterwards given for it. By reference to the 10th article of the will I have his own authority, that he did mean that. By these words he meant debts, whether settled and ascertained by security or not. By the subsequent clause, making the alteration of the time as to the debt, bequeathed by the 10th clause, from the year 1794 to 1796, he tells you what he meant by those words, viz. all debts whatsoever, that should be due in 1795 from the owner of *Bellfield* estate: not there qualifying it either by the words "upon the estate" or thus, "by mortgage, bond, "or open account;" and then I am authorized, if not required, to say, he meant the same thing in the 11th clause by the same words, that he had used in the 10th.

(1) It would seem that any *adjudication*, or *other proceedings whatever* in a foreign State, pursuant to their laws, by which the payment of a debt is enforced, and which is obligatory on the debtor there, must protect him from a suit for the same thing, in another State. *Stevens* v. *Gaylord*, 11 Mass Rep 265 *et seq*.

FAIRCHILD v. CAMAC, *Circuit Court of Pennsylvania*, 11th Oct 1819.

Rule to show cause why the judgment entered in this case should not be opened.

The Plaintiff produced a bond executed by the Defendant to the Plaintiff, both subjects of the King of the United Kingdoms of *Great Britain* and *Ireland*, and at the time residents in *Ireland*, bearing date in the year 1801, with a warrant of attorney annexed to confess judgment thereon, under which power this judgment was entered.

Gibson, for Defendant, in support of the Rule, contended, that judgment had been long since entered upon this bond, in *Ireland*; as appeared by the following indorsement on it "Judgment entered the 29th *October*, 1803," consequently that there no longer remained any remedy on the bond, but an action should have been brought upon the judgment He also objected that according to the practice of the Courts of this State, as well as of the *English* Courts, judgments upon a warrant of attorney could not be entered up *after ten* years from the time the money became due, without leave of the Court, upon a motion for that purpose; and the judgment in this case was entered *seventeen* years after

C. J. Ingersoll, for the Plaintiff insisted, 1st. That the entry upon the bond was not sufficient, or proper, evidence, to prove that a judgment had been entered up prior to the present; and if it were, still the warrant authorized the entering of *judgments* 2d, That the rule as to the necessity of obtaining leave of the Court after ten years is only applicable to cases where the Plaintiff has been within the State during that time *M'Clure* v *Dunkin*, 1 East 436. *Dicke* v *Mitchell*, 3 East 251.

WASHINGTON, J The first objection is fatal to this judgment The proof of a prior judgment is not given by the Defendant, but appears upon the bond and warrant of attorney upon which this judgment was rendered, and which the Plaintiff himself gives in evidence to support the present judgment Taking it then as proved, that a judgment was entered on the 29th *October*, 1803, the warrant of attorney was then *functus officio* As to the argument that the warrant authorizes the attorney to confess a *judgment* or *judgments*, in the plural, there is nothing in it; the latter expression could only apply to an imperfect judgment, which might be set aside, or reversed for error It could never contemplate the existence of two valid and subsisting.

Rule absolute.

Upon the whole, therefore, the meaning of this testator was to give all the debts these persons respectively should owe him at the period to which he alludes with reference to these debts. My former opinion therefore was wrong; and this decree is right in that respect.

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Aug 8 12.

See ante, vol. v 485 Vol vii 599

Claims by the agent for expenses on account of the principal, which from the conduct of the agent, undertaking the business without authority or agreement, could not be ascertained, disallowed.

Interest not carried further than the time the bill was filed on the ground of acquiescence.

THIS cause (a) came on upon exceptions, taken to the Master's report by the Defendant, objecting, that the Master had not made him sufficient allowances for the agent's wages, in proportion to the increase of the coal got beyond the stipulated quantity, for the benefit the Plaintiff derived from the use of the fire-engine, and in other respects. The cause also came on for further directions.

Mr. Hart, for the Defendant, insisted, upon the acquiescence of the Plaintiff, that interest could not be carried back further than the time when the bill was filed.

The Lord CHANCELLOR.—As I understand this case upon the exceptions it is put thus, that these expenses *Boultbee* would have been at, whether he worked the extra coal or not. The great difficulty is, that, where there is a charge for actual work and labour, you may calculate exactly, that, if it costs so much to raise 20,000 loads, it will cost so much to raise 30,000: but with regard to allowances for agent's wages there is no rate of proportion; for you may get an agent for 30,000 loads for very little more than for 20,000 loads. So, as to the fire-engine. If you could bring a distinct case, that, before the new colliery was entered upon, you paid an agent 10*l* a-year, and, after the new colliery was begun, he insisted on having 12*l*. a-year, that I understand, but what rate is there to go by here? The fire-engine is merely to draw off the water. That has nothing to do with raising the coals. He must have had some people attending the engine all day long. The difficulty is to get at any *ratio*; and, where that difficulty occurs, who is to suffer; the man, who enters upon the concern without making his agreement before hand; or the other party, upon whom he enters? The inference is fair, that, if 30,000 loads have employed 30 men in a year, one-third of that quantity will employ a third of that number: but the addi-

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(a) Reported ante, vol v. 485 Vol. vii 599.

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tional expense of agent's wages, working the fire-engine, &c. cannot be paid for by reference to the excess beyond the stipulated quantity; for in many cases the excess can be got just as cheap as the stipulated quantity. It is upon the Defendant to show what the master could reasonably have done. The principle is fair enough, that, if a man chooses to work my coals in the dark without letting me know, he ought to make a pretty clear case to entitle him to payment.

I can make nothing of the first exception. The second goes upon this, that the Plaintiff has had the use of the fire-engine in a certain proportion. I suppose, the answer is, that *Boultbee* was under covenant to have a good fire-engine all the time: and it was to be left at the end of the term, and that the engine, that did for the stipulated quantity, would do for the excess. It comes all to the same thing. I can easily conceive, and perhaps the truth may be, that the Defendant may not have allowance enough: but, where a man chooses to embark in a concern of mine without my leave, if he does not come off quite so well as if he had made a previous contract, he must take the consequences.

Upon the further directions, as to the interest from the time of the bill filed there is no doubt. The only [360] question is as to that period which is called the period of acquiescence. I will read the reports of the case, before I decide it: but, if this case had been originally before me, I should have made a much stronger decree than Lord *Rosslyn* made.

August 12. *The Lord* CHANCELLOR.—The only question remaining, that of interest, is of considerable importance. I have looked through the reports both of Lord *Rosslyn's* judgment and mine, upon all the circumstances of this case; and, under all the circumstances, my opinion is, that this is not a case, in which interest ought to be given before the time of filing the bill. The ground, upon which that opinion is formed, is this. Old Sir *George Beaumont* died in 1762. The present Sir *George Beaumont* was then six years of age. The matter went on through his infancy; and he afterwards went abroad. He returned in 1784; at which time consequently he was twenty-eight years old. From 1784 to 1790, old *Boultbee* lived. There was a great deal of communication between them upon this: but no bill was filed in his life; and he died certainly under the persuasion, that no demand was to be made upon him. The present Defendant had the misfortune under these circumstances to be his residuary legatee, and after the

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death of his father no bill was filed against him till 1798; and upon looking both at Lord *Rosslyn's* judgment and mine, as they appear in the reports of this case (*a*) though we were of opinion there was enough to authorize the decree, I see, we were both obliged to struggle through the circumstances of difficulty, which all this length of time had thrown in the way. It is enough under such circumstances, if he pays this money, for which he is made accountable by the decree, with interest from the time of [361 the bill filed; and, I think, he must pay the costs of the suit. The interest is to be paid upon all the sums found to have been due from the Defendant at the filing of the bill. The Defendant may have suffered from the length of time, but if this bill had been filed in the life of old *Boultbee*, or, if the cause had been heard for the first time before me, he would have certainly suffered a great deal more. One of the circumstances, upon which I think I ought not to give interest prior to the filing of the bill, is, that long before the bill filed all the parties knew very well, what was the excess of the getting.

(*a*) *Ante*, vol. v. 185. Vol. vii. 530.

WEBB v. LORD SHAFTESBURY.

July 30. *August* 13.

Annuity by will, charged on real estate in aid of the personal estate, ordered to be paid out of a fund in Court half-yearly, at *Midsummer* and *Christmas*. The Annuitant having died between *Lady-day* and *Midsummer*, her representative obtained an order for payment of the quarter to *Lady-day*.

MR. THOMSON, *for the husband and administrator of Susannah Leader, entitled for her life to an Annuity of* 400*l. secured by the bond of the testator, Sir John Webb*, moved that the sum of 100*l.* may be paid to him out of 300*l.* 19*s.* 8*d.* cash in the name of *The Accountant-General* on account of the testator's personal estate, for a quarter's Annuity, due to *Susannah Leader* on the 25th day of *March*, 1805.

The bond expressed, that the Annuity was to be paid quarterly, on the four usual quarter days. The testator by his will devised his real estates in the County of *Lincoln*, upon trust to raise such sums of money for the payment of debts, legacies, and Annuities, as his personal estate should fall short of paying. By an order, made on further directions, it was ordered, that the Annuitants should be paid half-yearly at *Midsummer* and *Christmas*, under which order the Annuity was paid by *The * Accountant-General*, from *Christmas*, 1803, to *Christmas*, 1804. *Mrs. Leader* died between *Lady-day* and *Midsummer*, 1805.

[* 362]

The Lord CHANCELLOR, after some consideration, made the order. (*a*).

(*a*) p. 362. *Rashleigh* v. *Master*, 3 *Bro. C. C.* 99.

1805.

Aug 10. 12 15.

PURCELL v. M'NAMARA.

The practice settled, that should be an order for the Master to proceed *de die in diem*.

Such order not imperative on the Master, but subject to his discretion.

MR. ROMILLY, and Mr. Hart, for the Plaintiff, moved that the Master may be at liberty to proceed *de die in diem* upon the references in this cause

Mr. Fonblanque, Mr. Thomson, and Sir Thomas Turton, opposed the Motion.

The Lord CHANCELLOR.—I observe, Lord *Alvanley* has expressed an opinion, (a) and in very strong terms, that the Master is not only at liberty to proceed *de die in diem*, but, that it is his duty to do so, when the case requires it: yet, in that instance he made the order. I took the practice to be the other way, and am certain, Lord *Thurlow* thought the Master could not proceed without an order Lord *Alvanley's* rule is the best; for the Master must from what he sees, be much the best judge of the propriety of it

[363] Aug. 15.

The Lord CHANCELLOR.—My opinion is, that the Master ought in this cause to be at liberty to proceed *de die in diem*.

As to the general point, after what Lord *Alvanley* has said in those strong terms I think it right to say, that, if, my opinion was the same as Lord *Alvanley's*, I would not make any order upon this occasion. but, recollecting the constant practice, it is impossible to say, so many orders do not afford decisive evidence, that the Master shall have the liberty given to him. But the Master is not to conceive the order to be imperative upon him. He has complete discretion to avail himself of it, or not, as the circumstances, passing before him, call upon him in the exercise of a sound discretion.

The order was made accordingly.

(a) *Langham* v. *Sturdy*, *ante*, vol. v. 423

1805.
Aug. 17.

SYKES *v.* HASTINGS.

Trustee not to be receiver, unless a special case, and without emolument. (1)

A MOTION was made by the Plaintiffs, that the Master may be at liberty to appoint —— *Sykes* to be the receiver; to which an objection was taken, that he was the devisee in trust to sell and distribute the money.

Mr. Johnson, in support of the Motion, cited *Mott* v. *Buxton*, and *Hibbert* v. *Jenkins*, (a) in the latter of which cases The Lord *Chancellor* gave liberty to a trustee to propose himself to be receiver. The character of devisee in trust, therefore, is no objection to the appointment of receiver.

[364]

Mr. Hart, for the Defendants, opposed the Appointment; citing —— v. *Jolland*, (a) in which case The Lord *Chancellor* approved the principle of the case before Lord *Rosslyn*. (b)

The Lord CHANCELLOR.—In *Hibbert* v. *Jenkins* I continued *Steele* as the receiver on the ground, that it was for the benefit of the estate, considering all his knowledge upon the subject; and it was expressly without emolument. I do not say, there is any general rule that will not bend to circumstances; but the general principle is, that the person, who accepts the office of trustee, engages to do the whole duty of a receiver without emolument. That is useful, as the Court appointing a receiver, looks to the trustee to examine with an adverse eye, to see, that the receiver does his duty. The consequence is, the case of appointing a trustee to be receiver is extremely rare, and only where he will act without emolument. There is no instance of such an appointment with emolument, unless no one else can be procured, who will act with the same benefit to the estate, where there is a necessity, from the circumstance, that by any one else the estate will not be so well managed. The principle of the Court is, that the trustee shall not be the receiver, if any other can be procured.

(a) In Chancery, *February*, 1805. (a) p. 364. *Ante*, vol. viii. 72.
(b) *Anon. ante*, vol. iii. 515.

(1) See *Verplank et al.* v. *Caines et al.* 1 Johns. Cha. Rep.

1805.

July 30, 31.

THE ATTORNEY-GENERAL v. JACKSON.

General objection by the answer to an information, that all the terre-tenants of the premises, charged with the Charity are not parties, without any particular description. The Court will direct inquiries what other lands are charged, &c. previously deciding the validity of the charge against the Defendants, before the Court.

THE object of this Information was to establish the right of the Charity to a small annual payment, charged upon premises, in *London*. The answer raised an objection, that all the owners of the premises which were referred to generally, as houses in *London*, without any particular description, were not parties.

The Attorney-General, and Mr. Heald, in support of the Information, insisted, that it is not necessary in the case of a Charity to bring all the terre-tenants before the Court in a suit for the establisment of the Charity, citing *The Attorney-General* v. *Shelly*, (a) and *The Attorney-General* v. *Wyburgh*. (b)

Mr. Romilly, and Mr. Wingham, for the Defendants.—This is contrary to the established practice of the Court in all other cases, and to principle. A case much more ancient than those, that have been referred to, the case of *East Grinstead*, (c) the last point, is in direct opposition to them, and that case is constantly referred to; as containing the law upon this subject:

"That, if a rent-charge be granted to a charitable use, "out of lands in several counties, the Commissioners are "to charge this rent by their decree upon all the lands in "every county according to an equal distribution, having "regard to the yearly value of all the lands chargeable "with the rent: and cannot by their decree charge one "or two manors with all the rent, and discharge the re-
[366] "sidue in other counties or places; for that their decree "will then be contrary to the will of the founders or "donors."

The Attorney-General v. *Shelly* is not to be found in the *Register's* Book, and, as the other case is there (a) stated, it appears clear, that the point reported in *Peere Williams* was not decided, and did not arise. From the pleadings, which are very particularly stated, it appears, that an appropriation of the lands in *Enfield* had been made by the Court of Wards to the purposes of the Charity, and the Court proceeded entirely upon that appropriation, and the decision of the Court of Wards. This point does not appear to have been raised by any of the Defendants. The decree directs inquiries, what other lands are liable to the rent-charge; in whose possession such lands are, and, what is their value. There is no analogy between a plea in abatement and an objection for

(a) 1 Salk. 163. (b) 1 P. Will. 599.
(c) Duke's Ch. Us. 64. (a) p. 366. Reg. Book, 1719.

want of parties. Lord *Redesdale* (b) says, "a demurrer "for want of parties must show, who are the proper par- "ties; not indeed by name; for that might be impossi- "ble: but in such manner as to point out to the Plaintiff "the objection to his bill, and enable him to amend by "adding the proper parties" It is not necessary to show the identical person, but merely to show the nature of the interest, so as to put the Plaintiff upon proper inquiries, for the purpose of amending his bill. The silence of the books of practice is evidence, that a Charity has no such privilege as is insisted on. Even an infant, enforcing a rent-charge, must make parties of all the persons out of whose lands it issues.

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The Lord CHANCELLOR.—The question is, whether the Court can proceed in the present state of the record as to parties. The Information is filed on behalf of this Parish to have the benefit of this charge, created by an instrument, made a great many years ago, for a very small annual payment. but I am not at liberty to consider the case otherwise than if the subject was a payment of much greater annual value The answer raising the objection as to parties, goes the length of pointing out, that there were houses once liable, that there still may be such houses, and therefore owners of them. The form of the pleadings therefore brings within the knowledge of the relators the possibility, that there may be other parties, capable of being put upon the record. It is true upon a bill for equitable relief as to a rent-charge, with some few exceptions, all the persons, whose estates are liable, must be brought before the Court, that complete justice may be done; and the question tried in the presence of all who are interested, also with reference to contribution among them: I say, with a few exceptions, for some cases are to be found, under circumstances, making the rule impracticable, or inconvenient, in a degree almost arising to that; and those circumstances have induced the Court to dispense with that rule

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Upon a bill for equitable relief as to a rent-charge all the persons, whose estates are liable must be parties The rule dispensed with under circumstances, making it impracticable or highly inconvenient

It has been urged for the Defendants, and 200 years ago would have been urged with great effect, that no distinction ought to be made in the proceedings between a Charity and an individual. But at this time it is much too late, with reference to a great many doctrines, to insist upon that, for the Court does hold out relief to Charities under circumstances in which it would not give relief against Defendants in ordinary cases I recollected passages in the books, as *dicta*, laying down the proposition, that an information may be filed on behalf of a

Distinction as to Charities Relief given to a greater extent than to individuals

(b) *Mitf.* 116

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Charity for a rent-charge, against one estate, where several estates were charged; and this Court paid so much attention to Charity, that it would leave all the * individuals to settle among themselves, under all the difficulties, that might occur in this case, the relief being given against one, instead of bringing all to agitate the question, as between all and the Charity. [* 368]

One passage, from *Duke's Charitable Uses*, (a) that has been relied on against the two cases cited by *The Attorney-General*, is in a sense to be reconciled with them. Probably the meaning was only, that, when the Commissioners are inquiring, and find a rent-charge actually given, they cannot by arrangement say, it shall be paid out of a particular estate, and discharge other estates, which are charged, but must establish the Charity, as it was established by the founder. But the question is, if a suit is instituted against any lands in Equity, admitting, that all are charged, whether the Charity can call upon one party to pay, not contending, that the others are discharged; but insisting, that the rule of pleading is, that the Charity may bring any one of the estates before the Court; leaving the owner of that estate, as he can, to sue the others for contribution

With respect to the passage in *Salkeld* (b) it has been observed, that nothing is to be found in the *Register's* Book as to the case, in which it occurs. But the proposition is laid down in the broadest manner, that in the case of a Charity it is not necessary that all the terre-tenants should be brought before the Court: but this is added, and the expression is very singular, that, "the "terre-tenants may, if they seek a contribution, under-"take to make them parties to the information; or help "themselves by such course as they think fit."

[369] The principle, here asserted, is, that *prima facie* a Charity may sue without making them all parties. But I cannot understand the concluding passage, unless in this sense: which is conformable to the case of *The Attorney-General* v. *Wyburgh*, (a) that, if the Defendants insist, that there shall be other parties, and can point out who they are, in that sense undertaking to enable the relators to make them parties, then they may be made parties: or, if, neither of them in all probability knowing the other property, that is chargeable, neither can point out the persons, who in respect of that property ought to be parties, there can be no species of undertaking by the terre-tenants with a view to make them parties, unless

(a) *Duke's Cha. Uses*, 65. The 7th point
(b) *The Attorney-General* v. *Shelly*, 1 *Salk*. 163.
(a) p. 359. 1 *P. Wil*. 599.

1805.

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they have a right to pray the assistance of the Court to make that inquiry; that all may be made parties, before payment is compelled. I express it so: for *The Attorney-General* v. *Wyburgh* strongly countenances some supposition, that such may be the doctrine of the Court. In that case according to the note, that has been produced from the *Register's* Book, it not only appeared by the information, that the *Chigwell* lands were charged; but one of the Defendants insisted by his answer upon contribution by the whole; and no person was before the Court, who had lands in *Chigwell*. So far the report is correct, for by the *Register's* Book that objection appears upon the pleadings. Upon what is said by The Lord *Chancellor* upon a plea in abatement, it has been justly observed, that according to the rules of pleading, as Lord *Redesdale* states,(*b*) it is not necessary to point out the parties by name: it is enough, if the objection points out, who the individuals are, by some description, enabling the Plaintiff to make them parties; and according to the modern course of pleading, that declaration by Lord *Macclesfield*, which is * capable of that interpretation, ought to be so understood, that his Lordship's intention was not to say that, the parties must be shown by name: but he made the observation in a case, in which he felt, that lands in *Chigwell* had been originally charged; but, what they were, and therefore, who were the owners, could not be pointed out by an answer, insisting only, that the *Chigwell* lands ought to contribute; not describing them; or pointing the attention of the relators to the owners.

Upon an objection for want of parties not necessary to point them out by name, if described so as to enable the Plaintiff to make them parties.

[* 370]

That point applies very much to this case; in which the objection, referring generally to houses in *London*, not particularly describing them, the site of which may now perhaps be part of the King's highway, does not sufficiently point the attention of the relators to the individuals to be brought before the Court. It appears, however from the record, that unless the passage in *Salkeld* is construed as I have construed it, *The Attorney-General* v. *Wyburgh* is hardly an authority in support of that case, and what Lord *Macclesfield* is represented to have said in the judgment he actually gave does not go further, than that, though a general objection for want of parties is stated, yet, if it is left uncertain, what are the lands and houses, chargeable together with those which are the object of the information, though they may have been purchased without notice, lost, or are incapable of being distinguished, the Court will go on; but will endeavour to aid the other persons, who are brought before the Court; not dismissing the informa-

(*b*) Mit 146.

1805. The ATTORNEY-GENERAL v. JACKSON

tion; but by inquiries, if any fair hopes can be entertained, endeavouring to bring ultimately before the Court those other lands or houses; if it can be ascertained, that they are not lost, or are capable of being distinguished.

[* 371] * By the note produced from the *Register's* Book, it appears, that lands both at *Enfield* and *Chigwell*, in different counties, were originally charged; that the estate had descended finally upon an infant who was in ward; and in the arrangement of his affairs the sum of 364*l.* was fixed by the Court of Wards upon the *Enfield* estate. But I cannot conceive, how that appropriation by the Court of Wards can affect the Charity; or necessarily, if the property went into different hands afterwards, throw the whole charge upon the *Enfield* lands, and entirely discharge the *Chigwell* lands. I can conceive this; that after that appropriation there might be purchases under the Court of Wards, and there might be circumstances in the transaction of those purchases, that as between those two estates would throw the whole upon the *Enfield* estate for ever. But the Charity could not be bound in that respect; and it does not appear from the decree, that The Lord *Chancellor* had made up his mind, that the *Chigwell* lands might not be answerable. By subsequent arrangement questions arose as between the owners of the *Enfield* lands; which was first liable: but still all were liable; and the passage in *The Attorney-General* v. *Wyburgh* may be taken as general argument: but, looking at the decree, the question is, whether The Lord *Chancellor* did not think himself bound by inquiry to find, whether that case admitted the application of the doctrine he had so asserted; for the *Enfield* people contending, that some were first liable, and some contending, that the *Chigwell* lands were charged, the decree was not, that the cause should stand over for want of parties, much less, that the information should be dismissed: which would be very strong in a Charity cause; whatever might be my private wish upon so small a demand as this: for the Court has gone a vast way in relieving against want of form * and mistakes in pleading as to Charities. But the decision was a reference to take the accounts, and see, what was due for the arrears, and what lands were set apart, and what is the value of those lands; and which of the parties have contributed towards the payment, or the repairs of the premises; and the decree does not stop there, but proceeds to direct an inquiry, "what lands there are, that are liable to the payment of "the rent," that is, though not set apart; "and in whose "possession, and what is the value of the said lands, and "to state the whole matter specially."

Extraordinary relief against want of form and mistakes of pleading in favour of Charities

[* 372]

The result is this, at least: that, if there is before the

1805.

The Attorney-General v. Jackson

Court, a party, who in respect of the land, possessed by him, is liable to the rent, charged upon that, and other land, not clearly and distinctly pointed out by objection for want of parties in the answer, further than that there were some houses originally charged, and the Court does not know who are liable with the Defendants, the Court will go on, at least to inquire, whether the Defendants are liable: whether, if they are liable, the Court will charge them, and leave them to a new suit, with the other terre-tenants; or, first deciding, that those lands are chargeable, will direct inquiries, whether any, and what other, lands are chargeable with them, it seems, the Court will not stop for want of parties under such circumstances; and I think it better to go on to determine, whether these lands are chargeable, or not; for, if not, the information ought to be dismissed. But, if I should now stop for want of parties, conceiving, that I cannot dismiss the information, I should then direct expensive inquiries, at the hazard, that I might find, the case had not been actually established in fact even as against the parties now before the Court. The best way therefore is to go on to hear the question, whether the rent-charge can be [373] proved to be issuing out of the land in question, reserving the consideration, what I shall do as to any lands, that may appear chargeable in the course of the hearing, until that principal question shall have been decided.

BULLOCK v. RICHARDSON.

1803. Nov 23.
1805. Aug. 27.

Discovery, in support of an action to recover money under the stock-jobbing Act, Stat. 7 Geo 2 c 8. confined to those clauses, as to which it is expressly given, with protection from the penalties, and therefore not extended to the 5th and 8th sections. (1) Though under the allegation of a fact by a bill the Plaintiff may interrogate to incidental circumstances, he cannot as to a distinct subject.

THE bill prayed a discovery as to an advancement by the Plaintiff to the Defendant of the sum of 41*l.* 5*s.* without legal consideration, as the premium for liberty to put upon, deliver, or refuse, stock, and in consideration of contracts in the nature of wagers, putts, or refusals, relating to the present or future price or value of stock; which are void within the Act, (*a*) suggesting an action brought by the Plaintiff within six months after the contracts.

The Defendant by his answer denied, that the Plaintiff did, on or about the 24th day of *May*, last, or any other

(*a*) Stat 7 *Geo* 2 c 8

{(1) See the notes to *The East India Company* v. *Neave*, *ante*, vol. v. 173.}

1805.
BULLOCK v. RICHARDSON

day, advance or pay to the Defendant the sum of 41*l.* 5*s.* or any other sum, as the premium, &c. (as charged by the bill,) or that any such wagers or contracts were made in *April* or *May* last, or within six months before the 3d of *August*, 1802, (when the action was brought,) admitting, that he was served with process in the action; and he insisted, that he was not bound to answer further.

[374] The Plaintiff took several exceptions to the answer, for not stating all the particulars of the circumstances charged by the bill: viz. whether he did not, on or about the 24th of *May*, 1802, or upon any other day, pay to the Defendant the sum of 41*l.* 5*s.*: whether there was any consideration: if any, the particular nature of such consideration: upon what contract: in whose behalf: in what manner, and at what time, &c.

The 4th exception was, that the Defendant has not set forth, whether the same sum, &c was not paid by or on behalf of the Plaintiff to or for the use of the Defendant, as a premium or premiums, or consideration in nature of a premium, for liberty to put upon, deliver, or refuse to accept, stock, or of wagers, or contracts in nature of wagers, putts, or refusals, between the Plaintiff and Defendant, or any and what persons on their behalf, or how otherwise, relating to the then present or future price of such stock, &c. or in respect of any and what other stock.

The 5th exception was for not setting forth the particulars of such wagers.

The *Master* reported the answer insufficient in part of the 4th exception. The Plaintiff took an exception to the report; suggesting, that the Master ought to have reported the answer insufficient in the whole of the exceptions.

Mr. Bell, for the Plaintiff, in support of the Exception, insisted that the Defendant ought to negative every possible way, in which the money could be received, and was bound to answer every possible case, except those, which would subject him to penalties under the Stock-jobbing Act.

[375] *Mr. Hollist, for the Defendant*, cited *Clifford* v. *Barnsley*, (a) and contended, that the Defendant was not bound to make any further discovery.

The Lord CHANCELLOR.—This is a bill for discovery in aid of an action. The 4th section of the act protects the person, making the discovery, against penalties: but they are penalties, imposed by the 4th section in relation to transactions, prohibited by the first section; and no bill of discovery is given with respect to what is prohibited by the 5th section, or by the 8th. It is very singular, if the intention of the Legislature was, that under

(a) In Chancery, before Lord *Camden*, 1767, MS.

those sections any thing should be recovered back by the action for money had and received, that they should not have said so, and have held out the protection they have with respect to other subjects; upon which a bill of discovery is given. I should therefore hold upon a bill of discovery of transactions, prohibited by the 5th and 8th sections of the Act, that the Plaintiff would not be entitled to that discovery, and, though it is impossible to deny, that those transactions are, in a sense, in the nature of wagers, yet in the contemplation of the Legislature they are not considered such wagers as are the subject of the first section. If one man agrees with another, not against the 8th section, or the 5th, but, neither having any stock, the one lays a wager, that stock will upon a future day be at a particular price, and upon that day pays the money, that would be a wager, as to which upon a bill of discovery for the purpose of bringing an action the Defendant must under the second section answer One question in this case is, whether the words "the price thereof" being in the Act, the bill is so framed as to allow the Plaintiff to insert in the interrogating part the words "or the "price thereof," though these words are not in the alleging part. The rule as to that is, that, if a distinct fact is alleged, the Plaintiff may inquire into every thing incidental. what, how, when, &c (a) But the proposition is different, and doubtful, where the Act has prohibited three separate and distinct things, especially, an Act, though in form remedial, really penal, that a question may be put in the interrogating part upon one of those substantive, distinct, facts; a wager, for instance, as to the future price of stock; the alleging part of the bill containing nothing as to that: whether that can be considered an incidental matter, to which the Plaintiff may interrogate. I think, as this bill is framed, in that respect, the Plaintiff has no right to call upon the Defendant to answer any thing but as to those very wagers, which are stated in the alleging part.

1805
BETHUNE
v.
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My present opinion is, that the matters prohibited by the 5th and 8th sections, are not those matters in respect of which a bill of discovery is given.

The exception was overruled. 1805 Aug 27.

(a) Faulder v Stuart, ante 296.

1805.
Aug 13

GLAISTER v. HEWER.

Purchase by a trader, afterwards a Bankrupt, in the joint names of him and his wife, is void as against the creditors within the Stat 1 Jac. 1 c. 15. s. 5.

AN inquiry was directed by The Lord *Chancellor*, upon the appeal in this cause,(a) how much money was laid out by the deceased husband of the Plaintiff in the purchase of the premises, and how much of that was the money of the wife

The Master's report stated, that the sum of 334*l*. 5s was laid out by the husband in the purchase, that 246*l* of that was the money of the wife, and the residue was the money of the husband

A petition was presented by the wife praying, that the report may be confirmed, that the estate may be sold, and, that out of the produce of that sale first the mortgage may be paid, and, that the costs of the Plaintiff may be paid, and that the sum of 246*l* may be paid to her

The petition was not opposed, and the order was made according to the prayer

(a) *Ante*, vol viii 195 Vol i [illegible]

Aug 14

WREN v. KIRTON

Receiver charged with a loss by the failure of the Banker; having made the remittances to his own credit and use; and not to a separate account for the trust (1)

[* 378]

THE petition, by the receiver of the real and personal estate of the testator *Charles Wren*, stated, that the petitioner on the 25th of *May*, 1804, received the sum of 198*l*. 18s 10*d* the amount of a debt due to the testator's estate by Sir *John Lawson*, who remitted to the petitioner a bill in his favour, for 200*l* dated the 20th of *May*, payable forty days after date, on *Moffat* and Co bankers in *London*. The petitioner placed the balance [illegible] to the account of Sir *John Lawson*, and on the [illegible] of *May* remitted the bill to *Castell* and *Powell*, Bankers in *London*, to be placed by them to his credit

The petition further stated, that on the 16th of *[illegible]* 1804, the petitioner received the sum of 582*l* 2s [illegible] the third and last instalment of a debt from *[illegible]* to the estate of the testator *Wren* and his partner *Joseph Airey*, deceased, and of the costs of an action, and of that sum 310*l*. 19s 7*d*. was due to the estate of *Wren* and 230*l*. to the estate of *Airey*, and the remainder was the costs of the action. On the 18th of *July* the petitioner



(1) See the notes to *Bacon* v. *Bacon*, and *Powell* v. *Evans*, *ante*, vol v. 331

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WREN v. KIRTON

procured a draft for 600*l.* on *Castell* and *Powell*, dated the 18th of *July*, and payable forty days after date, and the said sum of 582*l* 2*s* 2½*d* made part of that sum; which bill the petitioner endorsed, and remitted to *Castell* and *Powell*: who, on the 10th of *September*, 1804, became Bankrupts, and the petitioner received no satisfaction or security for the sums he had so remitted, except 99*l* 3*s.* 1½*d.*, for which he drew on *Castell* and *Powell* on the 5th of *July* in payment of part of the funeral expenses of the testator *Wren*, and a dividend of 5*s* in the pound received under the Commission, and 110*l* 13*s* 3½*d.* the residue of the two sums remitted to the Bankrupts by the petitioner, after those deductions, together with 1105*l.* 7*s.* remains due to the petitioner

The petitioner then stated, that he considered *Castell* and *Powell* as an old established house of very high credit [illegible] the Bankers of a Bank of great credit [illegible] and were thereby much connected with the [379] [illegible] which was the petitioner's in[illegible] employ them, and he was induced to open [illegible] account with them in consequence of his appointment [illegible] for the more convenient remitting the mo[illegible] he could not obtain bills from a coun[illegible] except at forty days date, that [illegible] and *Powell* allowed him no interest on balances in [illegible] hands, though it is usual for country Bankers to do [illegible], that he always remitted the money soon after he [illegible] it, or previously to the time of paying his ba[illegible] upon his accounts passed into Court, which ba[illegible] [illegible] by bills on *Castell* and *Powell*

[illegible] these circumstances the Master refusing to allow [illegible] the balance of 410*l* 13*s* 3½*d.* the petition [illegible] praying, that the Master may be directed [illegible].

The [illegible] *General, and Mr Bell, in support of the* [illegible] the case of *Knight v. Lord Plymouth*,(*a*) [illegible] *Routh v. Howell*,(*b*) the petitioner ought [illegible] with this sum In the case of Sir *Woods*-[illegible] your Lordship did, at last, allow the commit-[illegible] of the lunatic a sum of money lost by the failure of [illegible] at *Derby*, in which it had been lodged by the [illegible]

The Lord CHANCELLOR.—In that case Lord *Thurlow* never would allow it, but let it stand from time to time, until the family came of age: when they might do as they thought proper; and if it was afterwards allowed, that [380]

(*a*) 3 *Atk* 480 More fully reported 1 *Dick.* 120 [illegible] *Clarkson*, [illegible] vol vi 226 (*b*) *Ante*, vol iii 565

1805. must have been under particular circumstances. In *Knight* v *Lord Plymouth*, I apprehend, the deposit with the country Banker was to the account of the receiver, as receiver; not to his individual account My difficulty is, that the petitioner receives in payment of a debt a bill of exchange, which he was not bound to receive. That bill exceeds the debt, due to the estate, by a fraction certainly He transmits that bill to his own private credit Afterwards another sum is paid to him; and he transmits that, with other money of his own, to his own private credit If he had failed before the failure of the Bankers, this estate could never have claimed any part of the balance there, for it was carried to his own private credit, and there was nothing to prevent his paying any other debt with it It is impossible to permit a receiver to say, that previously to passing his accounts he is transmitting the money of the estate, as such, if he permits it to stand with his own property, to his own credit, for in that case, if any intermediate failure happens, his estate gets the benefit of the remittance. the trust estate get no benefit; and then I will not permit him to say, he shall not suffer the loss, if the Banker fails, but the trust estate shall suffer it It would be most dangerous to let a receiver deal with the money, as his own, until the time his accounts are to be passed, and, if any loss occurs, then to deal with it as the trust estate.

WILS v KIRTON

For the Petition.—In *Knight* v. *Lord Plymouth* it does not appear, that there was any thing to mark the money, as paid in on account of the trust estate. This proposition is established by that case; that a receiver is justified in remitting the money by a bill, instead of incurring [381] the hazard of bringing it up himself. The dates are material in these cases. There is a distinction between a remittance to his own Banker and permitting the money to lie there as his own for a long period. The first of these bills did not become due till the 2d of *July*, 1784. Out of that 99*l* was drawn for the funeral expenses The next bill was obtained on the 18th of *July*: and the last day of grace was the 30th of *August*. If a receiver could at any time pay the balance into Court, that would make a difference: but he could not possibly pay it into Court; as the Court was closed, and it was necessary to deposit the money somewhere The receiver's accounts had been taken to the 17th of *June*, and the balance was so trifling, that no report was made. Under these circumstances he remitted the money to a Bank in *London* There is this difference between a trustee and a receiver, from the recognisance, entered into by the latter The security of the money does not depend merely upon his solvency Such a case, a person acting with perfect *bona fides*, and adopt-

ing the only course he could take, except that suggested by the Court, of opening a separate account, must be excepted. 1805. WREN v. KIRTON.

The Lord CHANCELLOR.—I should not much fear to contradict that case of *Knight* v. *Lord Plymouth*, upon what has been done by later authorities, if it is as represented, for nothing is more dangerous. I know a receiver cannot receive money in the country. He must pay that which he receives into a Bank, and have a draft upon *London:* for no one will take it here. If he goes to a responsible Banker, and gets a bill upon a responsible house in *London* in his favour, as receiver, that bill, so ear-marked, would be specific assets, to the credit of the trust property: but when the Bankers received the amount [382] of that bill of 200*l.* might not any of his creditors have attached it? It would be very hard, if both Banks failed, that he should not be discharged. But, if the person, having himself an account with the Bank in the country, is, because he has payments hereafter to be made in *London*, so to deal, that, if solvency continues, the property is to be his own, but if insolvency happens, part of the account is to be that of the trust estate, and the dealing upon both bills is such, that until an account is taken in a Court of Equity, it cannot be ascertained how much belongs to him, and how much to the trust estate, it would be most dangerous to hold, that the loss shall fall upon the trust estate. Even in *Knight* v. *Lord Plymouth* there is this difference: that was a single transaction: but both the transactions in this instance appear to be mixed transactions; not of the receiver's money alone: the bills amounting to something more, in one instance a fraction more, than was received, and the whole was expressly directed to be carried to his own credit. The account produced also shows, that *Castell* and *Powell* were the general Bankers of the receiver, buying stock, navy bills, &c. with money received without any ear-mark, that the whole was used as his own money until the time of payment came.

This is certainly a very hard case, and therefore if by inquiry, as to the manner of keeping the accounts at both the Banks, the petitioner can bring forward any facts that will help him, I will hear them.

1805.



ROLLS April 30, 1804. Upon appeal before the Lord Chancellor, March 11. 15. August 27, 1805.

Bequest of leaseholds for years determinable upon lives, for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease. The term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death, as tenant by the year. Upon the general words, unrestrained, comprising the interest from year to year, and the intention upon the whole will, a subsequent lease, obtained by the executrix, the widow, and tenant for life under the will, was held subject to the uses of the will; as the residue of the term at his death, if any, however short, would have been.

JAMES v. DEAN.

THOMAS JAMES, by his will, dated the 25th of *April*, 1788, gave and bequeathed to *Ann Charlton*, all those eight acres of ground at *Standgate*, "being part of "fifteen acres of ground more or less held by me under a "lease from the Archbishop of *Canterbury* and all the "buildings, messuages, and improvements standing or being on the said eight acres of ground or any part thereof, "to hold unto the said *Ann Charlton*, her executors, administrators and assigns for all such term and terms of "years as I shall have to come therein at my decease."

He then gave and bequeathed to his wife *Judith James* during her life, his messuage wherein he dwelt, with seven acres of garden ground, the remaining part of the said fifteen acres, held by him under the said lease, from the Archbishop of *Canterbury*, with the houses and appurtenances, she keeping the said premises in good repair, and after the decease of his said wife he gave the said house, garden-ground, and the said last mentioned premises, to *Sarah James*, *Jane James*, and *Elizabeth James*, daughters of his deceased brother, their executors, administrators, and assigns, "for all such term, "estate, or interest, as shall be then to come therein, as "tenants in common in equal third parts or shares."

The testator then directed, that the rent, fine, and fees for the renewal of the lease of the aforesaid eight *acres of ground at *Standgate* should be paid by *Ann Charlton*, her executors, &c.; and of the other seven acres thereof by his said wife during her life, and by his brother's three daughters afterwards; as such rents, fine, and fees, become payable. Then, after giving some legacies to his nieces and a devise of a freehold estate, he made the following disposition:

"I also give and bequeath to my wife *Judith James* "during her life all my messuages, lands, and tenements, "with the appurtenances, in *Vine-street*, in the Parish of "*Lambeth* aforesaid, which I hold by lease under Sir "*William East*, for all the residue of my term and interest therein; and after her decease I give and bequeath "the same to my godson *Thomas James*, eldest son of "*William James*, the son of my former wife, his executors and administrators, for all the residue of the term "and interest I shall have to come therein at my decease, [* 384] "and I give and bequeath to my said wife *Judith James* "during her life all that leasehold estate called *Floatmead*, "in the Parish of *Lambeth* aforesaid, and all other the "estate, which I purchased of *Anthony Keck*, Esq and

"which I now hold by lease from the said Sir *William* 1805.
"*East*, dated the 3d day of *December*, 1783, with all the
"messuages, buildings, and improvements, thereunto be- JAMES
"longing, she paying for renewing the said lease at the v.
"usual times during her life, and keeping the said pre- DISS
"mises in good repair; and from and after the decease
"of my said wife I give the said leasehold premises to
"and amongst the said three daughters of my said late
"brother *Richard James*, share and share alike as tenants
"in common, and their respective executors, adminis-

The testator then gave several legacies, and, after 385
payment of his debts, funeral expenses, and legacies, gave and devised all the rest and residue of his moneys, securities for money, household goods, plate, china, linen, and all other his real and personal estate whatsoever, unto his wife, her heirs, executors, administrators, and assigns, according to the several estates, rights, and interests, therein, and he appointed his wife and two other persons executrix and executors of his will.

The testator was at the date of his will in possession under a lease granted by Sir *William East*, of the premises in *Vine-street*, *Lambeth*, dated the 12th of *August*, 1769, to hold for twenty-one years from *Lady-day* preceding; (a) if the lessor, his son, and another person, or any of them, should so long live, at a rent of 23*l.* 6*s.*; with a covenant by the lessee, that, in case of the death of any of the said lives, (being the lives upon which the lessor held those premises with others from the Archbishop of *Canterbury*,) before the expiration of the term, and the lessor should renew with the Archbishop, *James*, his executors, &c. would pay a proportionable share with the other tenants of the fines to the Archbishop upon every such renewal; and Sir *William East* covenanted upon such renewal of the original lease by the Archbishop to grant a new lease of the premises thereby demised for and during the remainder of the term of twenty-one years, which should [386]
be then to come and unexpired. The lease did not contain a covenant for further renewal. The testator died in *December*, 1790, the lease which expired on the 25th of *March* preceding, not having been renewed by him.

By indenture, dated the 29th of *March*, 1791, Sir *William East* granted to *Judith James* a new lease to hold from the 25th of *March* last for forty-two years, if Sir

(a) During the argument it was not ascertained, that the commencement of the lease was previous to the date, but by an inquiry, directed pending the appeal, it appeared, that the lease was to commence at *Lady-day*, previous to the date, in *August*, the consequence of which was, that half a year's rent under the occupation by the testator, subsequent to the expiration of the lease, was received during his life

1805. William East, Gilbert East, and George Curtis, or any of them, should so long live, at the yearly rent of 90*l*.

JAMES v. DEAN

The bill was filed by *Thomas James*, named in the will, against the executor's of *Judith James*, the testator's widow, deceased, and other persons, claiming the premises, as specifically bequeathed by *Judith James*; praying, that the renewal of the said lease by *Judith James* may be declared to be upon the trusts of the will of the testator *Thomas James*, &c.

The answer stated, that the lease of the 12th of *August*, 1769, did not contain a covenant on the part of the lessor to renew, and he was not bound in any manner to renew to *Judith James*, insisting, that she took the new lease for her own benefit.

Mr. Richards, and Mr. Cooke, for the Plaintiff, contended, that the new lease, taken by the widow, must be held upon the same trusts, as those, upon which the original term was given by the will

Mr. Romilly, and Mr. Steele, for the Defendants.—The question is, whether Mrs. *James* had any interest whatsoever at her death under her husband's will. The testa-

[387] tor himself had no interest to pass by his will: all his term and interest, the expression he has used, having expired nine months before his will took effect. The whole given to the widow was the then existing term, and that having expired before his death, the consequence is, she took the new lease as a perfect stranger. It cannot be supposed, the testator meant such future term and interest as he might have. She could not have recovered in ejectment, as upon a specific bequest. In *Rudstone* v. *Anderson* (a) *The Master of the Rolls*, putting it exactly as if "*interest*" had been the term used, held, that the new lease did not pass.

A renewed lease does not pass by a previous will.

The Master of the Rolls.—It is clear that if a man bequeaths a lease, or the premises he holds on lease, and the lease expires, the legatee is not entitled; though another lease exists at his death (b) He may certainly so express that intention as to pass any interest existing at his death. The question upon this will is, whether the testator has done any thing more than give the term he then had in the premises. His intention was merely to give the residue of the term he then had from Sir *William East*, and nothing more was in his contemplation. The words are "all my messuages lands and tenements with the appurtenances in *Vine-street* in the Parish of *Lambeth* aforesaid, which I hold by lease under Sir *William East* for all the residue of my term and interest therein:" that is, in that now existing lease. It

(a) 2 Ves. 418. (b) Marwood v. Turner, 3 P. Will. 163

could not mean any thing else. In the next clause he says, "I give and bequeath *the same*," that is, the same premises he then held from Sir *William Fast* for all "the residue of the term and interest I shall have to come "therein at my decease:" In what? "Those premises I "now hold by lease from Sir *William Fast*." He was thinking, not of any future interest he might by possibility acquire in the premises, but of what he actually had; and there are no words in the latter part that may not be connected fairly, so as to tie them up to the premises he then had by lease.

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The bill was dismissed. The Plaintiff appealed from that decree; and the cause was argued before The Lord *Chancellor* by *The Attorney-General, Mr. Richards, and Mr. Cooke, for the Appellant*; *and by Mr. Romilly, Mr. Leach, and Mr. Dowdeswell, in support of the Decree.*

11th March 1805.

The Lord CHANCELLOR.—It is very unsatisfactory, that I should have to decide this question without having yet seen either the original, or the renewed, lease. I must therefore see them before I decide. But I will give my opinion upon what has been said.

If the lease had been renewed in the testator's life, when it is stated, that *The Master of the Rolls* thought the intention was, that the bequest should pass nothing more than the term actually vested in the testator, when the will was made, no inclination of opinion would induce me to decide the contrary, unless they should refuse a case; for it is impossible for me to form any opinion upon such a point, which, if against that of *The Master of the Rolls*, ought to take from them the opportunity of having the legal title decided at Law. Yet I feel so much difficulty to say, that is the true construction, that I cannot, from deference to his Honour's opinion, deprive the party of the very strong opinion I have against that construction.

The question, whether the interest in the renewed lease would or would not have passed, must be decided, in order to raise any question between these parties upon the record; for, the lease not having been renewed, and the testator being at his death possessed of no larger interest than from year to year at most, the doctrine cannot be applied, unless it would have been applied, if he had been lessee in the renewed lease. As it is a sound rule of construction, that, when words are by their import *primâ facie* equivalent to pass future interests in personal estate, that construction ought to prevail, unless the con-

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Words *primâ facie* equivalent to pass future interests in personal estate to have that effect unless controlled by the context.

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text in sound interpretation calls for another construction, the question is, whether upon the whole it is safe to hold, that this testator meant a great deal more than he has expressed. He was possessed of fifteen acres under the See of *Canterbury* From that fact, they were his under a tenure that probably led to renewal. He has contemplated the circumstance, that that interest would probably be renewed He had bought of *Keck*, the lessee of the Archbishop, and, being sub-lessee, by that purchase, he had, what these sub-lessees usually have, a sort of concurrent covenant with that in the original lease: both having their interests continued upon renewals. Whether he had that covenant, or not, he contemplates upon the face of the will the circumstance, that his interest in that lease would be renewed He also had the premises in question under another lease, from Sir *William East*, who held under the Church of *Canterbury*. The lease the testator had in these premises did not contain any covenant for renewal But it did contain a covenant, that if Sir *William East's* interest should become less valuable by the dropping of a life or lives in the twenty-one years, for which the testator held, and Sir *William East's* lease should not have been renewed, yet he would renew; if his lessees would pay the fine Considering the nature of the estate, and of that covenant, something attached to the nature of [390] it, that might lead the testator to think, though there was no covenant for renewal beyond the twenty-one years, yet that term would not necessarily put an end to his interest. But it is not necessary to take that into consideration.

A renewed lease does not pass by a general bequest of all leasehold estates, unless controlled by the context.

I agree, that in *Coppin* v. *Fernyhough*, (a) and *Hone* v. *Medcraft*, (b) this general principle is established, that, where there is a general bequest, in the terms "all my "leasehold estates," and the testator afterwards surrenders, and takes a new lease, that is a revocation. But it depends upon the context of the whole will, whether that general doctrine is to be applied. A leasehold interest for years may be disposed of by a will, made, before the testator acquired that interest. But the general doctrine is, that you must show that intention. This will upon some parts, particularly the last bequest, must be interpreted to pass the future renewed lease. The different clauses of this will are much the same in effect; though expressed in different words. The obligation upon the wife to renew from time to time shows, he means, not only the interest he has in the present lease, but also the interest she would acquire under the condition. Between these bequests is inserted that upon which the question

(a) 2 Bro. C. C. 291. (b) 1 Bro. C. C. 260.

arises: always recollecting, that the person who is tenant 1805.
for life of part of one lease, and the whole of the other, and of these premises, upon which the question arises, is the wife: and that she is the general residuary legatee. His general intention therefore was, that, as to a particular part, she should take only a life interest, and as general residuary legatee she should take absolutely for her own benefit.

Whether these words, in the clause as to the premises in *Vine-street*, would not have carried to her the renewed lease I do not state. [391] It is immaterial: for if the subsequent words are large enough to carry the interest in the renewed lease, she being residuary legatee under that bequest, whatever interest is undisposed of would go to her. In the disposition over, after the decease of his wife, is not the effect, a declaration that he gives all? "The "same" means "messuages, lands, and tenements;" not this interest, but all he shall have to come therein at his decease. These words are too plain to be narrowed in construction, so as to say, he meant nothing more than what he had at the date of the will, and that, if he had any interest to come at his decease, he meant to give no part of that, if it was a new term or interest.

I feel therefore a strong inclination of opinion upon this question: but I shall not hold any opinion of my own without doubt, where *The Master of the Rolls* has held directly the contrary. If therefore they desire it, they must have a case for the opinion of a Court of Law: the whole turning upon it. But it will be of no use, if the fact be, that, as he did not renew, and the lease expired, the doctrine will not be applicable, that would have been applicable, if he had renewed, as he had not such an interest as would raise the same equity between the parties. The testator held over after the expiration of the lease, either as tenant by sufferance, or at will, or from year to year. To make out the Plaintiff's case, it must be contended, that the testator was tenant from year to year; for, if he was tenant at will, the general doctrine is, that the death of either party determines the will; and it would follow of necessity, that no interest passed by the bequest, and therefore the Plaintiff could not qualify an interest in him by virtue of the bequest, unless he can say, the opportunity the executrix had, of dealing with the estate her testator had in his life for an estate and [392] interest, fastens upon it a trust, not only for the general estate, but for the particular legatee of that property, though he cannot say, any interest passed by the will to him.

Generally the death of either party determines a tenancy at will.

The case of tenant by sufferance cannot be stronger

An executor to a tenant by sufferance, or at will, obtaining a larger interest, is a trustee for the residuary legatee; like the case of general occupancy.

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than that of tenant at will. The question is new, whether an executrix, dealing with the opportunities, which she derives by her succession without title to the estate a tenant by sufferance or at will had held, is a trustee for the person, who cannot say, he took an interest under the will: or, whether it is to be said against her, only, that the advantage she made of those opportunities should be for the general estate.

The result is this. I think, it is impossible she could hold it for herself. Not applying it to this case, but supposing another person, not the wife, was residuary legatee, the question, I should think, would be in favour of that other residuary legatee being a casual advantage from the dealing of the executrix, not an enjoyment of the property under the effect of a bequest the testator meant to make; for the bequest, operating nothing, must be considered as struck out, and not part of the will: like an executor, becoming general occupant, or happening to take freehold estate, not limited to any one. The question then is, whether the testator was tenant from year to year, and what is the consequence. That is also a subject *primæ impressionis*: quite new: but I have a strong inclination of opinion upon it. First, it is clear, if this testator had died at the close of the 20th, and the commencement of the 21st, year of the lease, subsisting at the date of the will, there is no doubt the effect would have been, that, though there was but a year to come, she would have been tenant for life; with remainder to the [393] nephew, for so much of the year as should not elapse in her life; and, if she had been tenant but for that year, and had renewed, she could no more have said, she was not a trustee, because it was only for one year, than if she had renewed in the tenth year. It is not the short or long duration of the interest that makes the difference. The question then is, whether the change of the nature of the testator's interest makes a difference? If he was tenant from year to year, does that interest pass under these words? If I am right in thinking, the future lease would pass under these words, if there was an express demise for one year, the consideration is the same, if it had been only a remnant of one year. Upon the authority of the case of *Doe* v. *Porter*(a) the interest of tenant from year to year is transmissible to representatives. Then I cannot see, why the benefit of that interest shall not be devoted to other persons, for whom the representatives are trustees; and the consequence is, that the testator would be taken to be lessee for a year, when he died, having an interest for a year in the estate, which would pass by the effect of these words

Interest from year to year transmissible to representatives, beneficially, or as trustees.

(a) 3 *Term Rep.* 13.

If it would not pass, could the executrix avail herself of it to say, it was a beneficial interest to her? Upon the case I have just mentioned she could. Could she refuse to avail herself of it, if the intention was to give the benefit of it to this legatee? This Court would not permit her to renounce it, if he had an interest in it which this Court would compel her to make good. The question then is, whether this is not the same, as if the lessee had died possessed of a term, of which only one year remained, or which was only for one year, and the person, who was tenant for life of that interest, in the course of that year renewed. It makes no difference, that the possession goes on from year to year: for she would have it in every year as executrix, until renewal. I have a strong inclination, that, if you can make out at Law, that the future lease, viz. a lease subsequent the will, would have passed to *James* after the death of the wife, the estate he had, if an estate from year to year would pass, and, if it did, all the consequences follow that result in this Court from a person having a renewable interest, giving the estate to more than one in succession.

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If there is any doubt whether this person was tenant from year to year, there must be an inquiry.

I cannot find any where that the equity was raised for a person who cannot say that any thing was meant to pass under the will to him.

I have entered in my own note of *Hone* v. *Medcraft*, in which case the decree is not accurately stated in *Brown*, that Lord *Thurlow* said, the distinction in *Abney* v. *Miller* (a) would not do. That was also stated in a case of copyhold estate in *Douglas* or *Cowper*; though it does not appear in print.

March 15.

The Attorney-General stated, that the fact was, that the lease expired, instead of *August*, as had been supposed, at *Lady-day* preceding, and half a year's rent, due at *Michaelmas*, was actually paid to the landlord before the death of the testator, who was therefore accepted as the tenant.

The Lord CHANCELLOR said, his opinion was, that if the testator was tenant from year to year, the renewed lease was taken for the trusts of the will, and directed the cause to stand for an inquiry as to the fact. [395]

Aug. 27.

The Lord CHANCELLOR.—The circumstances of this case are very singular, and the case is new in its kind.

(a) 2 Atk 593

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I shall therefore have no objection to hear it re-argued, if the parties should be dissatisfied with the opinion I shall now express

It seems to me, *The Master of the Rolls* was rightly of opinion, that under the circumstances stated to him the trusts of the old lease did not attach upon the new lease. The cause comes before me under different circumstances; and they are very singular The testator gives all the estate and interest he shall have at his death in certain premises, describing them The lease, under which he held, expired some time before his death. but he continued the possession of the premises, and became, as it now appears, a tenant from year to year at a yearly rent The consequence is, his will operates to pass that estate he had in the premises to his wife for life, with remainder to the appellant, and the question is, as the interest, which passed at the testator's death, was an interest he could bequeath by a will antecedent to his acquiring it, and that interest, though but a tenancy from year to year, being bequeathed to one for life, with remainder to another, if during the tenancy of the person, who took for life, acting upon the good-will, that accompanies the possession, she gets a more durable term, whether the persons, who are to take against her, are or are not entitled to say, that term is acquired for their benefit, as well as her own. If she had died in his life time, his term from year to year would have passed to the remainder-man; [396] who would have been specifically entitled to it. The consequence is, the term, though short, is bequeathed in these particular estates; and it cannot depend upon the question, whether the interest is long or short. Suppose only a quarter of a year subsisted at the death of the testator; if the tenant for life did renew, it must have been as well for the benefit of the persons to take afterwards, as herself The question then is, whether the words pass that new interest the testator got, and whether, having acquired that as a continuation of the interest he had, and that passing, it at all, under the will, the circumstance of her being tenant only from year to year makes a difference. My inclination is, that it does not. But I will consider it longer, before I give out the judgment.

The decree pronounced at the Rolls, was reversed, and it was declared, that the testator *Thomas James* had at the time of his death an interest in the leasehold premises in question, which passed by his will, and, that the renewal of the lease by the testatrix *Judith James* was subject to the trusts of the will of *Thomas James*, and

that the Plaintiff *Thomas James* became under that will entitled upon the death of *Judith James* to the benefit of the renewed lease, and the rents and profits of the premises. An account was directed of all sums paid *Judith James* for the fine and fees upon the renewal of the lease; and the Master was directed to settle, what proportion of the same ought to be paid by the Plaintiff; and an account was directed of the rents and profits, received since the death of *Judith James* by her executor and devisee.

1805. JAMES v. DEAN

Ex parte MARTON

[397] *Aug.* 15.

Expenditure by the Committee of a lunatic's estate without a previous application not to be allowed.

THE petition was presented by the Committee of the estate of a lunatic, tenant in tail, with remainders over to the Committee and others; praying to be allowed for expenditure upon the estate, made without any previous application; alleging, that great improvements had been made.

The Lord CHANCELLOR, expressed his regret, that the Court had, in a hard case, been induced to relax the rule not to allow any expenditure, made without a previous application; the consequence of which is, that Committees never make application. His Lordship added, that, as there was that instance, he would see what could be done in this case; which appeared fair; desiring it to be understood, that, in future, expenditure, made without a previous application, shall never be allowed. *(a)*

(a) Ex parte Hilbert, the next case. *Lon. ante*, vol. x. 104. The same rule as to a receiver, *Blunt* v. *Clitherow*, *ante*, vol. vi. 799.

Ex parte HILBERT.

Aug.

Expenditure by the Committee of a lunatic's estate without a previous application not to be allowed.

THE Committee of the estate of a lunatic, tenant for life, had expended to the amount of 6000*l.* upon the estate; and, as to 4000*l.* without an application. The petition prayed, that he should be allowed the whole.

* *The Lord* CHANCELLOR said, such a thing could not be permitted; and referred to another petition in the paper, upon an expenditure of 9000*l.* without any applica- [* 398]

1805. *Ex parte* [illegible]

tion whatsoever, observing, that it could not be allowed.

Mr. Piggott, for the persons entitled in Remainder, said, they were willing to take part of the expenditure upon themselves. An inquiry was therefore directed; regard being had to the estate of the lunatic, and to the proportion, that ought to fall upon the inheritance, and what part the owners of the inheritance are willing to take upon themselves. (a)

(a) *Ex parte* [illegible] the [illegible] case [illegible], *ante*, vol. x. 101 The [illegible] as to [illegible], *B*[illegible] *ante*, vol. vi. 799

Aug. 16.

Ex parte WETHERELL.

Equitable mortgage from a deposit of part of the title deeds, with evidence, not merely parol, but in writing, that the object was to create a security upon the whole. (1)

JOHN STARFORTH and his son *Gilbert Starforth*, being indebted to the petitioners, Bankers at *Durham*, gave their bond, dated the 15th of *July*, 1800; and by indentures, of the same date, agreed to give further security for the sum of 2500*l* then due to the petitioners, and for further advances, covenanting, that certain premises, mentioned in the schedule, should be a security accordingly; and some securities belonging to the *Starforths*, were also assigned

The petition stated, that in *October*, 1802, the balance having increased to 5000*l*. and the petitioners applying

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for further security, *Starforth* and his son agreed to deposit the title deeds of an estate, called the *Milnhouses*, of which *Gilbert Starforth*, the son, was seised in fee, as an additional security, and accordingly a bundle of papers was sent to the Banking-house of the petitioners, represented to be the title deeds of that estate, which the petitioners put up without examination. They continued to make further advances until the Bankruptcy of *Starforth* and his son, upon the 6th of *August*, 1803; after which they discovered, that the deeds, deposited as the title deeds of the *Milnhouses* estate, relate only to a moiety of that estate, and bring the title no further down than to the year 1725, and the Bankrupts retained the other deeds, until they got into the possession of the Assignees.

The prayer of the petition was, that the debt, due to the petitioners, may be declared to be charged upon the *Milnhouses* estate, as well as the other estates, comprised in the indentures of 1800: that those estates may

{(1) *Mandeville* v *Welch*, 5 Wheaton. 284 }

be sold, and the produce of the sale may be applied in discharge of the debt, and, that the petitioners may prove the residue. 1805

Ex parte WETHERELL.

Gilbert Starforth upon his examination stated, that *Bolton*, one of the Bankers, in conversation expressed their wish to have a regular mortgage of the [illegible] estate and the other estates, comprised in the indentures of 1800, stating, that the title deeds were in their hand. Upon which *Starforth* in answer expressed a wish, that there should be a regular mortgage, and communicated their wish to his father; who said, they were unreasonable, and had security enough.

A memorandum was produced, written by *Gilbert Starforth*, intituled "A schedule of the annual value of the "property of *John S*[illegible] [illegible] security "to *Messrs. Banbury* and *Co.*" In that [illegible] dule the estate at [illegible] was the first article. 400

Mr. Romilly, and Mr. [illegible] *in support of the Petition.*—If no Bankruptcy had happened, the petitioners would have been entitled to a decree for a mortgage, and the Assignees must be in the same situation. The ground, upon which [illegible] is taken out of the Statute,(a) is [illegible], as [illegible] papers had been delivered, under the representation that they were the deeds, like the case of a promise [illegible] to pay: a charge upon an estate in [illegible] any other case of fraud. It is not necessary, that the whole complete title should be in the petitioners. The son upon his examination admits, that these deeds were delivered as the title deeds; and, though not delivered originally, they were left in the hands of the petitioners, with his privity, stating, that, when informed, that the deeds had been deposited, he made no objection, and expressed his desire to his father, that a further security might be made according to the desire of the petitioners.

Mr. Richards, and Mr. Cooke, for the Assignees.—This application stands, not upon an agreement for a security upon the estate, but upon this, that the petitioners have the deeds, which are the muniments and evidence of the title. Certainly the Court would not take the deeds out of the hands of the lender. If it was put upon agreement, it would be of no effect, being by parol. In this instance the petitioners have only a few of the deeds. If nothing more than blank paper had been delivered, it could not have the effect of an equitable mortgage. The party claiming under a deposit must see, that what is [401]
given as a deposit of deeds is really so. It was incumbent upon the petitioners to take care, that they had the

(a) Stat. 29 Ca. 2, c. 3, s. 4.

1805. *Ex parte* WHITBREAD.

security they meant to rely upon. The conclusion upon the affidavits, and the circumstance of the possession of these deeds by the Bankrupts at the date of the Bankruptcy, is, that there was not an agreement for a deposit, which was only of deeds as to a moiety of the estate, not by the owner, but by his father, having no interest himself, and without authority from his son.

The Lord CHANCELLOR.—Under all the circumstances of this case there is sufficient evidence in writing, (and that is the ground upon which my decision stands,) to raise an equitable mortgage of the whole of these estates. It is very well, though it has not been long, settled, that if there has been a delivery of deeds, that, in this Court, amounts to an equitable mortgage, and the possession of the deeds is, if no other purpose is shown, evidence of an agreement that the estate itself shall be a security. It has never yet been decided, how far it is necessary to deliver all the title deeds: or whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the instruments to amount to evidence, that the estate was meant to be a security. It is clear on the other hand, that, if a man has my title deeds, he cannot, without my privity, by making a deposit of those deeds oblige me to give a mortgage. He certainly may have the possession of them under such circumstances, that, if he hands them over to a third person, there will be insuperable difficulty in my getting them back from that person. But a mere deposit will not bind me to give him an actual interest in the estate.

Equitable mortgage by delivery of deeds. The possession of the deeds is, if no other purpose is shown, evidence of an agreement, that the estate itself shall be a security.

Whether it is necessary to deliver all the deeds, Query.

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In the present case, which is not a mortgage, though there was something like a mortgage in 1800, by the father and son, securing 2500*l.* then due, and further advances, it is alleged by the depositories, that the agreement, accompanying the deposit, was made upon the representation, that these were the title deeds of the whole estate. If that agreement was made out by clear, admissible, evidence, as against the Bankrupts themselves, and therefore against the Assignees, this Court would enforce the effect of that contract, compelling them to make good that representation. The son states, that he knew nothing of it, but admits, that *Boulton*, one of the Bankers, in conversation expressed a wish upon their part, that a regular mortgage should be made, not only of the *Milnhouses* estate, but of the other estates, described in the deed of 1800, stating to him, that the title deeds were in the hands of the Bankers. That is an express communication to the son, that they had the deeds. He does not intimate, that his father sent them without his privity: on the contrary he expressed a wish to *Boulton*, that there

should be a regular mortgage, and communicated their wish to his father; who said, they were unreasonable, and had security enough. The representation of the son in writing is, that he inserted the *Milnhous* estate with the particulars of the other property in mortgage to the Bankers: an original paper in his own hand-writing, entitled, "A schedule of the annual value of the property "of *John Stanforth* and son given in security to the Bank," stating the *Milnhouses* and the other estates; not a moiety, but the entirety. Then is it more satisfactory to go upon the effect of the deposit of the deeds, though all, that related to that, passed in parol; or to say, that under the hand of the party it appears, that the meaning of the deposit of such of the deeds as were deposited was to create a security upon the whole? The evidence is [403] quite sufficient to attach a security upon the whole estate. Make the order (*a*).

1805.
Ex parte Whitbread.

(*a*) *Ex parte Haigh*, the next case. *Ex parte Coming*, ante, vol. ix. 115.

Ex parte HAIGH.

Aug. 21

Equitable mortgage by the deposit of a lease.

THE object of this petition was to establish a security upon a leasehold estate, by way of equitable mortgage, in consequence of a deposit of the lease by parties, who being indebted to the petitioner, and in very embarrassed circumstances, applied to him for assistance by discounting; after which application the lease was delivered.

Mr. Richards, and Mr. Johnson, in support of the Petition. Mr. Romilly, and Mr. Bell, contra.

The Lord CHANCELLOR.—The case of *Russell* v. *Russell* (*a*) is a decision much to be lamented, that a mere deposit of deeds shall be considered as evidence of an agreement to make a mortgage. That decision has led to discussion upon the truth and probability of evidence, which the very object of the Statute of Frauds (*b*) was entirely to exclude. In this case these parties, being unquestionably pressed to the very verge of Bankruptcy, unless immediately assisted, and being indebted to the petitioner, applied to him to discount. He hesitated at first. [404] The lease was deposited, and it is difficult to collect whether the original deposit was as a security for the bills, then discounted, or for future discounts. The rule, (and

(*a*) 1 *Bro. C. C.* 269. (*b*) Stat. 29 *Ch.* II. c. 3. s. 4.

1805.

Ex parte Haigh.

I repeat my regret that it ever was established,) calls upon the Court to decide upon parol evidence, what is the meaning of the deposit: which, independent of the Statute of Frauds, ought always to be by writing. Still after that decision we must engage with that difficulty. It is said, this is not usual among tradesmen. But one of the greatest mischiefs is, that persons in this city, and other commercial towns are continually dealing in these deposits, not having persons with them, who are capable of advising them: and the Bankrupt paper is swelled by petitions, to ascertain what these deposits are. Upon the evidence in this case the Master is right. Therefore confirm the report, and make the order according to the prayer. (a)

(a) *Ex parte Haigh* [illegible] the preceding case *Ex parte Coming*, ante, vol. [illegible] In *Ex parte* [illegible], Lord Eldon expressed his disapprobation of Lord *Thurlow*'s decision in *Russel* v. *Russell*, as breaking in upon the Statute of Frauds; and declared, that a deposit of deeds should not be [illegible] except in a clear case, refused so to treat it in that instance.

Aug. 16.

Ex parte METCALFE.

A. and *B.* Bankrupts. Proof in respect of a cash balance due from *A.* to *B.* but the dividends retained, to reimburse the estate of *A.* what it should over pay upon a distinct transaction; an advance of bills from *A.* to *B.*, some of which were dishonoured.

THOMAS WILLIAMSON and *Worrall Palmer* had dealings together and kept accounts respectively; commencing on the 7th of *August*, 1800, and ending on the * 9th of *February*, 1802, in the course of which it appeared, that *Palmer* had received from *Williamson* in cash and bills the sum of 6424*l.* 9*s.* 3*d.*, and *Williamson* had received from *Palmer*, in cash, the sum of 5824*l.* 19*s.* 7*d.*; making a balance of 599*l.* 9*s.* 8*d.* in favour of *Williamson*. On the 11th of *February*, 1802, *Palmer* committed an Act of Bankruptcy. On the 13th of *February*, *Williamson* committed an Act of Bankruptcy, and Commissions issued against both.

[* 405]

Several of the bills, delivered to *Palmer* by *Williamson*, were drawn by *Williamson* on *Thomas Goodenough*, and were in circulation at the time of the Bankruptcies: but such bills, to the amount of 1098*l.* were not accepted or paid by *Goodenough*. Several holders of such dishonoured bills proved them under the Commissions; and received dividends of 10*s.* in the pound upon the whole sum of 1098*l.* amounting to the sum of 549*l.* under the Commission against *Palmer*, and 6*s.* 8*d.* in the pound, amounting to 366*l.* under *Williamson*'s Commission. At the meeting for a final dividend, the Assignees of *Palmer* applied

1805.

Ex parte Metcalfe.

to prove 498*l.* 10*s.* 4*d.* under *Williamson*'s Commission, as a debt due to the estate of *Palmer*, and claimed to be paid their share of the former dividend, alleging, that the amount of the said dishonoured bills, being the said sum of 1098*l.* ought to have been discharged from the sum of 6424*l.* 9*s.* 3*d.*, and so there would appear to have been a balance of 498*l.* 10*s.* 4*d.* due from *Williamson* to *Palmer* at the date of his Bankruptcy: but the Assignees of *Williamson* objected to the proof, insisting, that even admitting, (which they did not,) such balance of 498*l.* 10*s.* 4*d.* to have been due from *Williamson* to *Palmer* at the date of his Bankruptcy, they were entitled to be paid out of the estate of *Palmer* 199*l.* 16*s.* 8*d.*, having been compelled to pay 366*l.* in dividends upon the sum of 1098*l.* the [106 amount of the dishonoured bills, which sum of 366*l.* exceeded the amount of the dividends of 6*s.* 8*d.* in the pound on the sum of 498*l.* 10*s.* 4*d.* by the sum of 199*l.* 16*s.* 8*d.*

The Commissioners refused to permit the proof by the Assignees of *Palmer*, and adjourned the dividends under both Commissions to give an opportunity of applying to The Lord *Chancellor*: upon which this petition was presented by the Assignees of *Williamson*, praying, that the Assignees of *Palmer* may be restrained from proving the said sum of 498*l.* 10*s.* 4*d.* under *Williamson*'s Commission, and that the petitioners may be permitted to prove such sum as shall appear due to the estate of *Williamson* under *Palmer*'s Commission.

Mr. Romilly, and Mr. Heys, in support of the Petition, observing, that both parties contended for more than they were entitled to, contended, that this was not like the case of cross-paper; *Ex parte Walker*: (a) *Ex parte Earle*. (b) In this instance there was no distinction between bills and cash, as in the case of cross-paper, the bills being negotiated, and therefore as good as money.

Mr. Cullen, for the Assignees of Palmer, opposed the Petition.

The Lord CHANCELLOR.—This is a very difficult question. It is not a case of cross paper. There is a cash transaction, and a bill transaction, and the demand of *Palmer*'s estate against *Williamson*'s estate is to prove the cash balance: the effect of which is to lay out altogether [407 the paper amounting to 1098*l.* letting the bills fall, as they may upon the respective estates. That cannot possibly be. On the other hand, it is contended in support of the petition, that being, not cross-paper, but mutual advances of cash, and paper upon one side only, the whole ...

(a) Ante, vi. (b) Ante, vol

1805. Ex parte METCALFE.

to be looked upon as advance of cash on both sides: and, as if the paper was good. With a view to simplify it, the best way will be to suppose, there was no cash transaction; and that there was one bill for 1000*l.* Suppose *Williamson* put that bill into the hands of *Palmer*, and consider, first, what was that paper with reference to *Williamson*. If it was a bill, upon which he could have recovered from acceptors, and indorsers, and he put it into the hands of *Palmer*, who by means of that bill raises the money, it might be contended, that *Palmer* would be debtor for 1000*l* to *Williamson*, parting with that valuable paper. But put it the other way, that it was a bill in no other sense than as being drawn upon a third person; and, before it was determined, whether he would accept, *Williamson* gave it to *Palmer*, who indorsed it, and it never was accepted: would it be possible for *Williamson* to maintain an action, until it came back again to him; and he had paid money in respect of it? The consequence is, that, until the bill came back upon *Williamson*, *Palmer* would not have been debtor to him; and if it had not come back to him till after the Bankruptcy there would have been no debt at the Bankruptcy. Then, while the paper was afloat, could *Palmer* have recovered the 498*l.* due upon the cash transaction? He could not. The answer of *Williamson* would be, that *Palmer* had his name engaged in that bill still in circulation, and *Williamson* must be disentangled from that, before the other could call for his balance.

[408] If between these parties, considered as solvent, *Williamson* is entitled to say, *Palmer* should not have the 498*l.* until he had restored the bill, being put into his hands as a medium of raising money, and the first obligation was upon *Palmer*, what difference does the Bankruptcy make? No other difference than this; that, if the Assignees of *Williamson* protect his estate against any liability upon the bill, *Palmer*'s estate is entitled to a dividend upon the sum of 498*l*: that is, in order to keep the accounts finally right, *Williamson*'s estate is entitled to retain the dividends due to *Palmer*'s estate, to the extent of making them applicable to protect the estate of *Williamson* against the bill. The answer to the objection, that in that way *Porter*'s estate will get 50*l*: is, that it is accident. If the Bankrupt estate paid 20*s*. in the pound, that would not be so; for then *Williamson*'s estate, retaining all the dividends *Palmer*'s estate, would be entitled to in respect of the 498*l* with a view to protection against the proof in respect of the paper, the thing would come round: the bill would be taken up by *Palmer*, and the 498*l.* would be paid by *Williamson*.

Therefore the sum of 498*l.* is to be proved against the

estate of *Williamson* by *Palmer's* estate: but to the extent of the proof against *Williamson's* estate upon the bills, the Assignees of *Williamson* are entitled to retain and apply the dividends in respect of that proof for the exoneration of the estate of *Williamson*, to reimburse themselves all the dividends they should pay upon the bills, which ought to be taken up by *Palmer*. To alter this decision it must be shown, not only, that the bills were accepted by *Goodenough*, but, that they were accepted on account of what the acceptor owed to *Williamson*. 1805. *Ex parte* METCALFE.

Ex parte JONES.

[409]
Aug. 20.

A Commission of Bankruptcy cannot be superseded, before the Bankrupt has surrendered.

THE petition was presented by a Bankrupt, praying, that the Commission should be superseded; and the bond assigned.

Mr. Fonblanque, and Mr. Cooke, for the Assignees, objected that the Bankrupt had not surrendered, though the time for his surrender had expired a year ago; and mentioned a late case, *Ex parte Jones*,(a) in which before the Bankrupt had surrendered, Lord *Eldon* would not permit the Commission to be superseded; notwithstanding all the creditors consented.

The Attorney-General, and Mr. Romilly, in support of the Petition, said, it was presented, before the time for the Bankrupt's surrender expired, but from particular circumstances it was not answered in time.

The Lord CHANCELLOR.—It has been determined frequently, that the Bankrupt must surrender, and after much discussion in the late case, *Ex parte Stokes*.(b) Upon the reason also it is proper, for, if the Bankrupt is not to surrender, until he has had sifted to the bottom here the trading, the Act of Bankruptcy, and the petitioning creditors debt, when these particulars afterwards come to be proved before the Commissioners, many persons, against whom Commissions of Bankruptcy issue, will disprove every thing.

Let this petition stand over; that the Bankrupt may have an opportunity to surrender, and let him state to the Commissioners that this petition is presented, and they will not go further into the circumstances than their duty requires. [410]

(a) *Ante*, vol. viii. 328. (b) *Ante*, vol. xi. 105.

1805.
Aug 19

Ex parte WILSON.

Holder of a bill of exchange discharging the acceptor by receiving a composition, cannot come upon the drawer. (1)

IN *July*, 1799, *Andrew Paul Pourtales* and *Andrew George Pourtales*, drew two bills of exchange upon *Claessen, Kreckhoefer*, and Co. of *Hamburgh*, at three months after date, for 350*l.* and 250*l.* payable to the order of the petitioner, for valuable consideration. The bills were accepted: but before they were due, the acceptors stopped payment, and the bills were returned protested. The drawers afterwards became Bankrupt. The petitioner's proof in respect of the bills was objected to, until he should have had recourse to the estate of the acceptors, and have received such dividend as should be payable from their estate. The petitioner sent the bills to his agent at *Hamburgh* for that purpose; who received a dividend from the estate of the acceptors, and was afterwards admitted to prove the residue of his debt under the Commission against the drawers: but before any dividend was received under that proof it appeared, that no proceeding in nature of a Commission of Bankruptcy had issued against the acceptors; but their affairs were settled by a deed of composition; which the petitioner's agent had signed upon receiving the dividend in full discharge of the estate of the acceptors. The petition prayed, that the dividends under the Commission should be paid to the petitioner. It was admitted there was no fraud; but the deed of composition was signed, and the dividend received, by his agent without inquiry. The petitioner [411] stated, that the Assignees and the Solicitor under the Commission pressed the petitioner to apply and receive what might be obtained from the estate of the acceptors; representing, that he should prove for the residue: but, upon the affidavits there was no special undertaking; and the transaction appeared to originate in a mistake of all parties, supposing, the proceeding at *Hamburgh* was in the nature of bankruptcy.

Mr. Richards, and Mr. Cooke, in support of the Petition.

Mr. Romilly, and Mr. Cullen, for the Assignees, cited a late case, *Ex parte Gaultier*, (*a*) which was upon a foreign bill of exchange.

The Lord CHANCELLOR.—The law is not disputed. It was very well settled by Lord *Thurlow* (*b*) upon great

(*a*) The Sittings after *Trinity* Term 1805.
(*b*) *Ex parte Smith*, 1 *Cooke's Bank. Laws*, 168, 171.

{(1) *Lynch* v *Reynolds*, 16 Johns Rep 41.}

deliberation, that, if a person, having the security of drawer and acceptor, with effects, (a distinction much to be regretted, having given very mischievous authenticity to accommodation paper,) gives the acceptor time, and much more if the drawer fully discharges the acceptor by composition, the holder can no longer make a demand upon the drawer, whether solvent, or not: for this reason; that, if the drawer could come upon the acceptor afterwards, the acceptor does not receive any benefit by the composition. The nature of the contract must therefore be, that the holder shall so deal with the bill, that no third person shall come upon the acceptor in consequence of his act. I remember, Lord *Thurlow* said, he had consulted the Judges upon that case. The decision is therefore of very high authority. Lord *Kenyon* was struck with this consideration, that, if the holder did all he could substantially do for the benefit of the persons, whose names were upon the bill, that was all, that could be expected; and held, that he should, if he really acted for the benefit of the other parties by taking a composition from the acceptor, go on against the drawer. But the misfortune of that is, that the other parties have a right by law to consider, what is for their benefit, and are the judges of that; and that has been carried so far, that the actual Bankruptcy of the acceptor does not dispense with the necessity of notice to the drawer.

1805. Ex parte Wilson.

Distinction of drawer and acceptor with effects, and not, mischievous, with reference to accommodation paper.

Holder of bill giving time to the acceptor discharges the drawer.

[*412]

That being the law, I felt a wish to find that part of the petition sustained, which represents, that the Assignees and the Solicitor pressed the petitioner to get what benefit he could in the affairs at *Hamburgh*; intimating, that he should afterwards prove under the Commission. But the affidavits amount only to this; that the Assignees and the Solicitor, being persuaded, that there was a Bankruptcy at *Hamburgh*, and a dividend, actually set apart, so that in Bankruptcy it was to be considered as received in diminution of the proof, do make that representation, and, that the petitioner shall receive dividends under that Bankruptcy, before he comes to prove under the Commission in this country, and the future dividends after proof. The petitioner accordingly sent to his agent at *Hamburgh*; not inquiring, whether the proceeding there was a Bankruptcy or a composition, and the agent signed the deed of composition; which in respect of payments under it actually discharges the acceptor. The question, whether the petitioner was by fraud drawn in, or required to sign the deed of composition, is a mere question of fact. The whole was a common mistake, under the apprehension of all, that it was a Bankruptcy: but, that being misapprehension, the consequence from not knowing, what the act was, must fall [413

1805. Ex parte WILSON.

upon the person who did the act; who therefore, having by himself or his agent accepted a composition in full of the whole demand, is unfortunately, but effectually under circumstances, that exclude any demand by him against the drawer's estate.

April 6, 11, 13. Aug. 27.

Ex parte ST. BARBE.

Partners engaged individually in other concerns: if they are distinct, proof may be made in Bankruptcy of debts as between the different estates: not, if they are merely branches of the joint concern.

THE petition, and the affidavits in support of it, stated that a joint Commission of Bankruptcy issued against *Metcalfe* and *Jeyes*, by the description of Oilmen, Insurance Brokers, Dealers and Chapmen. They commenced their partnership in 1793 under an agreement to carry it on as general Factors and Insurance Brokers, and in such other trades, as they should agree upon. During the progress of that partnership *Metcalfe* carried on the trade of an Oilman, as a distinct and separate concern, and also was, upon his sole and separate account, appointed Ship's Husband to sundry vessels, and in that character he gave orders to the house of *Metcalfe* and *Jeyes*, as Insurance Brokers, to effect insurances, and he also gave them orders for insurances on account of other persons, which he had orders to get made. He also purchased goods from the partnership of *Metcalfe* and *Jeyes*: and thereby and by the premiums, due to them as Insurance Brokers, *Metcalfe* was become indebted to the partnership of *Metcalfe* and *Jeyes* to the amount of 7144*l.* 9*s.* 1*d.*

[414] The affidavits represented, that these trades were carried on in distinct premises; that distinct accounts were kept; that the rent and taxes of each house were paid separately; and each had a separate Banker. Under these circumstances the petition was presented by the Assignees of the joint estate to be admitted to prove against the separate estate of *Metcalfe* the sum of 7144*l.* 9*s.* 1*d.*

Mr. Romilly, and Mr. Cullen, in support of the Petition, cited *Ex parte Johns*, (a) observing, that upon the affidavits these trades were perfectly distinct.

The Lord CHANCELLOR.—There have been cases of a trade carried on by three, and distinct trades by two and by one of them, where this sort of proof of a debt, distinctly due from one partnership to the other, has been permitted as between the partners, so engaged in different concerns. The course of the authorities has been, that a joint trade may prove against a separate trade; but,

(a) 1 *Cooke's Bank. Laws*, 538.

not a partner against a partner. In the case of *Shakeshaft, Stirrup*, and *Salisbury*, (b) Lord *Thurlow* went upon this distinction, that, where there is only one partnership, arranging different concerns, belonging to them all, in different ways, for the benefit of different parts of that joint concern, as in that instance, the three partners carrying on the business of cotton manufacturers in *Lancashire*, and two of them in *London*, there could not be proof by the three against the two: but if the trades are perfectly distinct, then the three, as cotton manufacturers in *Lancashire*, might be creditors upon the separate concern of the two, as ironmongers in *London*. I am inclined to abide by that case and *Ex parte Joh.* But I doubt whether this case comes up to those; whether this demand is really constituted by distinct dealings between one trade and another, and is any thing more than mere personal receipts of money by one partner, on account of the partnership, and to be laid out for the partnership: not as carrying on a distinct trade.

1803. Ex parte St Barbe. [415]

The petition stood over, until The Lord *Chancellor* was satisfied, that the trades were distinct; when the order was made, declaring, that as it appeared, *Metcalfe* carried on a distinct trade or concern from that of *Metcalfe* and *Jeyes*, the partnership is entitled to prove against the estate of *Metcalfe* such debt as he in such distinct trade or concern owed to the partnership.

Aug. 27.

(a) Stated, *ante*, vol. vi. 123. 711. 717.

Ex parte LANE.

Aug. 21.

The jurisdiction in Bankruptcy to assign the bond being, with reference to the Bankrupt, confined to the case of malice, and conclusive, The Lord Chancellor in a case of strong suspicion only would not assign the bond; but superseded the Commission with costs, without prejudice to an action.

THIS petition was presented by a Bankrupt; praying, that the Commission against him may be superseded, and the bond assigned. There was no doubt, that the Commission could not be sustained: but a difficulty arose as to assigning the bond, depending upon the question, whether the Commission was sued out from malicious motives.

Mr. Romilly, and Mr. Hart, in support of the Petition. Mr. Fonblanque against it.

1805.

Ex parte [illegible]

[* 416]

The Lord CHANCELLOR.—The exercise of this jurisdiction requires great attention, for the Statute (a) gives The Lord *Chancellor* the * jurisdiction to assign the bond, with reference to the Bankrupt, only in case The Lord *Chancellor* shall find, that the Commission was taken out maliciously, and it has been lately decided in the Court of King's Bench, that no one can dispute that finding of The Lord *Chancellor*, who is to act as a Jury, and if he assigns the bond, that is decisive evidence, that the Commission was maliciously sued out, and neither more nor less can be recovered than the penalty of the bond. (a)

The circumstances of this case at least raise strong suspicion of a malicious motive. But the petitioner may bring an action. If I assign the bond, I not only decide, that there was a malicious motive, but I cannot measure the damages; the petitioner must have the 200*l* he cannot have more or less. I will either direct an issue *quantum damnificatus*, or an inquiry before the Master, and let him bring an action, as he chooses.

The order, afterwards made, was, that the Commission should be superseded with costs, without prejudice to an action.

(a) Stat. 5 *Geo.* 2. c. 30. s. 23.
(a) p. 116. *Smith* v. *Broomhead*, 7 *Term Rep.* 300, *Southey* v. *Edmonson*, 3 *Ves.* [illegible] *Ex parte Gatton*, 1 *Atk.* 111.

CASES

IN

CHANCERY, &c.

THE SITTINGS AFTER TRINITY TERM, 45 GEO. III. 1805.

1805

April 10.
Aug. 1.

Ex parte KING.

In Bankruptcy the discretion of the Commissioners as to the Bankrupt's Certificate not controlled.

THE petition, presented by *John King*, a Bankrupt, prayed a declaration by The Lord *Chancellor*, that there not having been any dividend declared under the Commission ought not to be an objection against the Commissioners signing the Bankrupt's certificate; that the Certificate ought under the circumstances to be put in a course of being allowed by his Lordship; and that the Commissioners may be directed to certify, that the petitioner has conformed according to the Statute; (*a*) and, that the creditors, who signed the Certificate, are full four parts in five in number and value for not less than 20*l.* respectively; or that such other order may be made as the justice and equity of the case may require, and that the proceedings may be produced at the hearing of the petition. The petition stated, that the Commission issued against the petitioner upon the 6th of *November*, 1802: that the petitioner had in all things conformed himself, that four-fifths in number and value of the creditors, for not less than 20*l.* as required by the Act, had signed the Certificate, that it was also signed by two of the Commissioners: but under a petition by the joint-creditors of the Union Bank, praying liberty to call a meeting, to prove their debts, that the allowance of the certificate might be suspended, and that they might be allowed to assent to, or dissent from, the Certificate, it was sent back to the Commissioners to be reviewed, with a direction, that those petitioners might be admitted to [418

(*a*) Stat. 5 Geo. 2. c. 30.

1805. prove, and to assent, &c. The petition further stated, that two of the Commissioners refuse to sign the Certificate, upon the objection, that no dividend had been declared, insisting, that it was not occasioned by any conduct of the petitioner.

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The Commissioners, who had refused their signature, the third having signed, by a certificate stated to The Lord *Chancellor* their reasons, which they had also stated to the Bankrupt: viz the circumstance, that no dividend had been declared: a declaration by the Bankrupt to one of them, that, if he should not get his Certificate, he would supersede his Commission, which he refused to explain to their satisfaction: the only explanation being, that it would be for the interest of his creditors on account of the information he could give relative to his estate, that the debts, due to him, represented to exceed 25,000*l* were, with the exception of two small sums, stale demands, or claimed from persons out of the jurisdiction, and the Bankrupt's examination not necessary as to the greater part: that a large property, that will come to the Bankrupt's wife after the death of her brother, protected from the creditors only by a settlement after marriage, was not disclosed, and upon the circumstances they have reason to doubt, whether the Commission was

[419] taken out *bona fide*, and have a strong suspicion, that fictitious debts were proved for the mere purpose of obtaining the Certificate. The Commissioners also repeated these reasons personally in Court; declaring, that they cannot conscientiously make the Certificate.

The Attorney-General, Mr. Cooke, and Mr. Plowden, in support of the Petition.

The Lord CHANCELLOR.—This case is very important, and perfectly new in the principle: a petition to The Lord *Chancellor* to direct the Commissioners to make their Certificate in the terms of the Statute of *Geo* II. Lord *Hardwicke's* language in *Ex parte Williamson*, (a) though not that of decision, but that he did not know, that a *mandamus* would lie, has been repeated since continually in Bankruptcy. A discretion, unlimited, is unknown to the Law and Constitution of *England*. It is the duty of the Commissioners to communicate without reserve the reasons upon which their judgment is formed. Many things are to be observed, where The Lord *Chancellor* decides upon allowing or disallowing the Certificate, with which the Commissioners have little to do. If upon all the circumstances the conduct of the Bankrupt, and of creditors in some instances, where it is connected with

Whether a *mandamus* to sign a Bankrupt's Certificate lies, *Query*.

(a) 1 *Atk* 82 2 *Ves*. 249

the knowledge of the Bankrupt, or his conduct, the Commission appears to be the Commission of the Bankrupt, not of the creditors, The Lord *Chancellor* is bound not to grant the Certificate. The circumstance, that no dividend has been declared, is not alone sufficient. but it may with other circumstances prevail, and it must be brought as a fact with other circumstances to bear upon the question, whether the Commissioners could with judicial truth make the Certificate I have frequently allowed a Certificate, where a dividend had not been made But the Commissioners stand very much as I do with reference to another point. If I should refuse to allow the Certificate again, the Bankrupt might desire me to re-consider that judgment, or he might come upon other circumstances. So the Commissioners ought to hear explanations as to the circumstances, the want of a dividend for instance. I hesitate to make any order upon the Commissioners to review their judgment, for they will not scruple to do so without an order. If finally they cannot be satisfied, then discretion must be, in a sense at least, a judicial discretion: whether liable to control, or not, is another consideration. The Commissioners cannot honestly refuse their Certificate, unless under the sanction of their oath they are satisfied, that the Bankrupt has not duly conformed to the Statutes, and, that there is reason to doubt, whether he has made that discovery he ought according to the Statutes to make. They are pledged by the sanction of an oath to speak their real sentiments, arising from their observation upon the whole of the Bankrupt's conduct. Their refusal is to be taken, as if they swore they could not grant the Certificate. Lord *Thurlow*, Lord *Rosslyn*, and Lord *Clare*, delivered in the House of Lords their clear opinion at length, that much less mischief will arise from trusting that pure discretion to the creditors, than by leaving it to The Lord *Chancellor* to decide under all the circumstances, whether the creditors had a solid ground for refusing to sign the Certificate The language of the Statute requires a positive act by the Commissioners also. They are to certify, what seems to me the collection of their reasoning upon their whole observation, that there is no reason to doubt, that the Bankrupt has made a full disclosure. That is a distinct fact, without which the Certificate does not come to The Lord *Chancellor*, whose act is preceded by the act of the Commissioners. The Lord *Chancellor*, granting, or withholding, the Certificate, is influenced by a vast number of considerations, to which the Commissioners are not to attend. I feel considerable doubt as to the control over them, and whether, if there is that controlling power, it is in me to direct them to do that, which they cannot in

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1805. their consciences do. Upon that I have so much doubt, that I should have the consideration of a Court of Law, before I would act. If the petitioner moves for a *mandamus*, the question will be, whether the Court could interfere, if the Commissioners state, what I take them always to state in substance, refusing their Certificate, that they cannot upon their oath say, the Bankrupt has conformed to all the Statutes, and, they have no reason to doubt, that his disclosure is full. This is nothing more than a question of Law. The Court of King's Bench, deciding upon that, will take into consideration, whether that is the only remedy, or whether The Lord *Chancellor* has a right to make such an order as this petition prays

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The petitioner may make any application to the Commissioners, that he thinks proper, to review the proceeding: but until their conclusion upon that application is stated to me, it is not necessary for me to do any thing.

The Commissioners persisting in their refusal to certify, the petition stood for judgment

Aug 1. *The Lord* CHANCELLOR.—When the Certificate under this Commission was laid before me, I looked into it; and circumstances appeared in the Bankruptcy, that made it difficult to believe all was fair. It was apparent upon

[422] the Certificate, of which I do not recollect a former instance, that it had been prepared, before the Commission was taken out. The signatures also appeared suspicious: many upon erasures; and it was probable upon the face of it, that names had been erased. The Certificate had recited, that a Joint-commission had issued against *King* and others: stating the conformity of the Bankrupts under that Commission: which had never been taken out; and the result is, that a Joint-commission having been in contemplation, this Certificate had been prepared: that Commission however was not taken out: but a separate Commission issued, and the Certificate, that had been prepared for the Joint-commission, was by erasure and management reduced to a Certificate, applying only to this Bankrupt. The Certificate having been signed by several persons, the signatures were re-traced with a dry pen; and then an affidavit was made, that those persons had signed the Bankrupt's Certificate. I declared, I never would allow a Certificate, obtained in such a manner. The objection consisted more in those very peculiar circumstances than any thing, that appeared then upon the proceedings in the Bankruptcy.

The petitioner seems to have been under some diffi-

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culty in determining what relief to pray. The petition calls upon me to do some act, in order to force the Commissioners to do what the petition alleges to be their duty. First, I must be satisfied as to my power. 2dly, which I have much considered, that, supposing I have no power, it is fit for me to interpose in any other way; for if different duties are by law reposed in different persons, I have a very serious doubt, whether it is proper to come to those, who have no right to regulate the discharge of the duties of others, to discuss, how much more or less of recommendation is to be given to persons, who are to act upon their own consciences, to act, not under that influence, but according to the direction of those who are [423] not intrusted to determine what is right as to that.

First, To consider my authority to set the Commissioners right, if they are wrong. 2dly, if I have no such authority, what step it can be proper for me to take. The Commissioners examined the Bankrupt very strictly, and very properly also, as to other topics appearing on the Certificate; and they aver, that according to their conscientious sense of duty under the obligation of their oath they cannot do the act he proposes to them. Upon that the question arises, whether I can inform them, that they shall sign the Certificate: whether, acting under that obligation, they feel themselves at liberty to do so or not; or, if I cannot say that, can I, if my conscience differs from their's, give them a hint to substitute my conscience, after the oath they have taken to act according to their own?

Previously to a certain period, the arrangement and management of the estates of Bankrupts was wholly in the persons holding the Great Seal, in this sense, that there were no Commissioners. Afterwards from the increase of business the appointment of new officers became necessary, and many years ago it was incumbent upon those, to whom that authority was committed, to devolve it upon persons who were to act as Commissioners. Their duties under the various Acts of Parliament are very important. They are bound to take an oath, obliging themselves, under that solemn sanction, faithfully, impartially, and honestly, according to the best of their skill and knowledge, to execute the powers and trusts reposed in them as Commissioners: and that without favour or affection, prejudice or malice. At different periods different benefits, upon different terms, were given to Bankrupts: their conformity, manifested in different ways, entitling [424] them to the benefit. At this day, to obtain the benefits to which he is entitled, he must obtain his Certificate: and to entitle him to offer it to The Lord *Chancellor* for allowance, four-fifths in number and value of the credi-

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tors for not less than 20*l.* respectively must sign it. The most absolute and entire discretion is intrusted to the creditors by the Statute; and there can be no stronger proof of the good nature and humanity of the *British* character than the readiness with which creditors sign, without any thought, even previously to the third meeting, when a full disclosure is to be made; though at the time of signing there has been no examination; and I mention it with a hope, that Commissioners will remember, that it is very doubtful, whether a signature previous to the last examination is such as the Act of Parliament intended.

Whether a signature of the Bankrupt's Certificate previous to the last examinations is valid, *Query.*

Next the Commissioners are to sign; who have the right given to them to exercise judicial discretion, duly and fairly applied to the circumstances, whom, it appears by the Act, the Legislature recollected as having been present at all the transactions during the Bankruptcy; better judges therefore of the conformity than The Lord *Chancellor* or the two Judges can be, and therefore the Legislature directed, that the Certificate should lie before the latter a considerable time, to give opportunity for complaint before it should be allowed. The words of the Act *(a)* are very large, and the Certificate is, not merely, that he has conformed himself, but, that he has made a full discovery of his estate, and in all things conformed himself according to the directions of the Act; and there does not appear any reason to doubt the truth of such discovery; or, that it is not a full discovery of all his estate and effects. Two of the Commissioners have stated
[425] to me under the sanction of their oath, (for every act done by them under the Commission is done under that sanction,) that they cannot certify, that they have no reason to doubt, that this is a full disclosure and discovery. Then, notwithstanding that, have I a right to issue a mandatory order to them to say, that it is? No such authority is given to me. If it exists any where, it must be in the Court of King's Bench, by an application for a *mandamus*. Whether that will lie, or the proceeding can go further, if the Commissioners state upon their oath, that they had reason to doubt, whether a full disclosure has been made, is not for me to discuss. There are many acts of the Commissioners, that the Great Seal cannot control; the Commissioners having the authority to do them given by the Legislature. I do not think, upon reflection, that if the Commissioners commit the Bankrupt for not answering to their satisfaction, sitting in Bankruptcy I could discharge him. *(a)* They have that power, and in

Whether a *mandamus* to Commissioners of Bankruptcy to sign the Bankrupt's Certificate will lie, *Query.*

(a) Stat. 5 *Geo.* 2. c. 30. s. 10.
(a) p. 425 *Ex parte Nowlan, post.* {511.} *Taylor's case, ante,* vol viii. 328.

that case I know it has been held, and properly, that their opinion, whether the answers are satisfactory, may be reviewed. But the mode is by suing out a writ of *habeas corpus* and a return to that; and then The Lord *Chancellor*, not under the Bankrupt Statutes, but as a law officer, having a right to issue that writ, by the general law, has the return brought to him, as any other Judge, and determines; the review of the conduct of the Commissioners in that instance not being shut out.

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The mode of reviewing the judgment of Commissioners of Bankruptcy, committing the Bankrupt for not answering satisfactorily, is by *habeas corpus*

It is then objected, that a man may have fully conformed, and yet cannot have his Certificate. The answer is, that the same observation will apply to the Great Seal, and the Judges, to whom the Certificate may be referred; and is founded in the necessary consequence of the infirmity of human judgment The power of determining must be lodged somewhere: more cannot be done than by placing it somewhere under the most solemn sanction, and against innocent error relief cannot be given by those who have not the power. Many cases may occur, in which the mere circumstance that a dividend has not been made, is no objection to the allowance of the Certificate by The Lord *Chancellor*: but a declaration, that that circumstance is no reason for either The Lord *Chancellor*, or the Commissioners, withholding the Certificate, is an abstract declaration, that may be true or false, according to the circumstances of every case. In many instances it may be certain, that, though no dividend has been made the disclosure has been full and honest, and, that the dividend has been prevented only by circumstances, that made it impossible, or prejudicial to the creditors, to make a dividend. On the other hand, I have no difficulty in saying, that is a circumstance, to which the Great Seal is in a due degree to look. A case, like this, the creditors upon the third examination led to suppose 10,000*l* will be coming to them, and the Certificate is not laid before the Great Seal until two or three years afterwards, when the property ought to have been distributed, and the prospect held out to the creditors, is reduced to an actual produce of about 900*l* and particularly with such a Certificate as this, must be looked at with great anxiety and jealousy. An abstract rule, therefore, which will not govern all cases in all circumstances, is an undue proceeding; and the question both before the Commissioners and the Great Seal must be upon all the circumstances of the particular case; upon which question both of them, acting under the sanction of an oath, are to determine what is right.

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The public nature of the proceedings before the Commissioners, and the responsibility of the Commissioners by giving the reasons for their conduct, is one of the best

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securities. They have certified to me that they gave the Bankrupt an opportunity of explaining his declaration, that, unless he should obtain his Certificate, he would supersede his Commission. If it is his proceeding, it is not a Commission within the Act of Parliament: whether that is a ground for the Commissioners to refuse to sign the Certificate; or, whether they ought to state to the Great Seal, that they had judicially an apprehension of it. That declaration is capable of two interpretations: either the obvious one, that he has the power, and will exercise it; or the sense the Bankrupt afterwards gave to it, that, having regard to all the circumstances, in which he stood, as to the information he could give relative to his estate, it was for the interest of the creditors, and they were convinced of it, to have the Commission superseded.

The Commissioners by their certificate further say, the two, who refused to sign the Certificate, stated their reasons for withholding their signature: 1st, that declaration, which the Bankrupt refused to explain to their satisfaction, and from the circumstances they have reason to doubt, whether the Commission is taken out *bona fide*: 2dly, that the Bankrupt stated debts due to him at 25,000*l.* and the result upon his examination was, that, with the exception of two small debts, they were either stale demands, or due by persons out of the jurisdiction; and as to the greater part his examination was not necessary: 3dly, that a large property will come to the wife of the Bankrupt upon the death of her brother; which will be protected from the creditors of the Bankrupt only by a settlement after marriage; and that was not disclosed.

[428] With reference to these reasons, if the consideration was before me, whether this was a full disclosure or not, attending to all the circumstances in this Bankruptcy, that declaration, with the explanation, as it is called, looking at the state of the property, as it has been represented from time to time, available to the extent, in which it has been made available, making just allowances, (and certainly great allowances are to be made as just allowances,) for failure by dishonesty, the death of debtors, and other accidents, which crush the expectations of creditors, making all allowances, that can be made, recollecting what passed upon the former Certificate, and considering it in this point of view, that the fact, whether the Commission is the Commission of the Bankrupt, or not, may be material as evidence with reference to the other fact, whether a complete disclosure has been made, and looking to the settlement of the Bankrupt's wife, and the nature of the examination, here stated, it would be too hasty in the exercise of such a power, if I had it,

without great consideration to say, there is no reason to doubt, that this is a full disclosure. If the Commissioners, reviewing their judgment, still think, there is reason to doubt, I do not see how they can set their hands to the Certificate; and as to the consequence, if they mistake, I can only lament it: but I cannot either by order or intimation tell them, having taken that oath, that they are to act in any manner, that is not consistent with their own conscientious judgment, upon an anxious and painful review from time to time of all the circumstances of the case.

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ADAIR *v.* THE NEW RIVER COMPANY.

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July 24, 25, 25. *Aug.* 1

Whether an Annuity or rent charge out of the profits of the *New River* Company is to bear the full assessment to the land-tax, or is to have the benefit, according to the proportion, of a reduction in consequence of an assessment upon the profits of the Company at an undervalue, *Quære*

The bill by the Annuitant was dismissed; the Court refusing to raise an equity as to the profit arising from disobedience to the Act

THE bill stated the incorporation of the *New River* Company by King *James* I. reserving to the Crown one moiety of the profit to arise, and accordingly the Company granted at the nomination of the King, and for the use and benefit of him, his heirs and successors, to the use of trustees, one moiety of all such fines, sums of money, benefits, and profits, whatsoever, above the expenses; upon trust for the King, his heirs and successors.

By indentures, executed in the seventeenth year of King *Charles* I. to which the Company were parties, his Majesty granted to Sir *Hugh Middleton*, his heirs and assigns, all the trust, use, and benefit, of the moiety of the Crown, provided, and Sir *Hugh Middleton* covenanted, that he, his heirs or assigns, would pay for the use of the King, his heirs and successors, the yearly rent of 500*l.* By several grants of the Crown and *mesne* assignments that rent became vested in *William Adair*, who died in 1783; having devised the rent to trustees and their heirs, to the use of the Plaintiff for life, with remainders over.

The bill further stated, that by various assignments the moiety of the Crown became vested in the Company, or in the Company and the other Defendants, (eight in number,) and other persons, amounting to one hundred, or a much greater number, that the profits amounted to *50,000*l.* a-year, and were assessed to the land-tax in the yearly sum of 3600*l.* being 4*s.* in the pound upon the

The general rule, requiring all persons interested to be parties, is dispensed with, where it is impracticable, or extremely difficult. In such a case, to obtain a decree, to establish the right [illegible] instance, the Court only requires parties sufficient to ensure a fair contest, (1) and, the right being established, in that way, consequential relief may be had against the rest in another suit.

{(1) *Wendell* v. *Van Rensselaer*, 1 Johns. Cha. Rep. 349. *Brasier* v. *Blackly*, 1 Johns. Cha. Rep. 437.}

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yearly sum of 18,000*l.* the nominal amount of the profits, but not more than 1*s.* 6*d.* or at most 2*s.* upon the real profits. The bill stated applications by the Plaintiff to the Defendants for a discovery of the real amount of the profits, and payment of the 500*l.* *per annum* from *April*, 1798; deducting the land-tax in proportion to what was actually paid by the proprietors, and to be repaid what was overpaid by him; which they refused, claiming to deduct 100*l.* *per annum* for the land-tax; and that they have paid only 400*l*, and charged, that there was not any tangible or corporeal property, upon which the Plaintiff can distrain, and the parties are so numerous, and the shares liable to so many complicated trusts, and so fluctuating, that it is impossible, if the Plaintiff could discover them, to bring them all before the Court; and these impediments were produced, not by the Plaintiff, and those, under whom he claims, but by the Defendants, and prayed an inquiry, what sum of money ought to be deducted on account of the land-tax; that the Defendants may be decreed to pay the difference between that and what was actually charged, and that the right of the Plaintiff may be declared to receive the rent without any greater deduction than after the rate actually paid.

The *New River* Company by their answer admitted, that their profits were more than 18,000*l* *per annum*, but did not state the amount. They submitted, whether all parties interested are not necessary parties, notwithstanding the moiety was granted to a single person.

An objection was taken for want of parties; all the persons interested not being brought before the Court.

Mr Richards, *Mr Alexander*, *Mr. Bell*, *and Mr. Neave*, *for the Plaintiff*—The necessity of bringing all persons before the Court, to whom interests in the property belong, though true in theory, does not prevail in practice. Where it is impossible, a case of exception arises In a late case *Harding* v. *Pratt*, upon that ground the Court gave liberty to apply for an Act of Parliament The same principle appears in *The City of London* v. *Richmond*, (*a*) *Quintine* v. *Yard*, (*b*) and *Lloyd* v. *Loaring*. (*c*) This Plaintiff has before the Court some of the parties interested, and the legal holders of the property. Some of the persons interested, being before the Court, are sufficient to maintain the question. In the instance of a bill by simple contract creditors against trustees insisting, that an estate is charged with debts, it may be impracticable to bring be-

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(*a*) 2 *Vern.* 420 *Pre Ch* 156 1 *Bro P. C* 30.
(*b*) 1 *Eq Cas. Abr* 74. (*c*) *Ante*, vol. vi 773.

fore the Court all the bond creditors. They may be very numerous, and not known. The habit is to bring some of the specialty creditors, to discuss the question with the Plaintiffs; which is then decided with reference to the trustees; and the estate declared well charged; though only a few specialty creditors are parties. It is not even necessary to make any of them parties, and decrees have been often made upon bills by simple contract creditors in the absence of all the specialty creditors, though generally for convenience some of them are made parties, as being interested to discuss the question. As to the remedy of the Plaintiff, there is great difficulty in distraining. The Crown made the Corporation the legal tenants of the estate. The only title in the Crown was to an account; therefore no more could be granted to Sir *Hugh Middleton*. The subsequent grants of the 500*l.* a-year, partaking of the nature of a rent-charge, could give only a right to an account. The Court will assimilate it, as much as possible, to an equitable distress: fixing it upon those persons, whom it may be possible to make parties. [432] The rule of Equity, to bring before the Court all persons interested, as in the case of a joint and several bond, is a rule of convenience, for the sake of the Defendants; but it cannot be used to disappoint entirely the justice of the Court, as the Defendants are entitled to contribution; which would be an abuse of the rule, contrary to its principle and object; and would make the forms of justice subversive of its end. That rule is therefore in many cases dispensed with upon the principle of convenience, as legatees, general and residuary, are represented by the executor. In the case of scheduled creditors, very numerous, the objection, that they must be before the Court, for the purpose of having a decree for payment of debts out of real estate, has been made; but has not prevailed: and there are many other instances, in which for convenience, or rather necessity, the rule has been dispensed with.

Independent of the Land-tax Acts the Plaintiff is entitled upon equitable principles: *Brockman* v *Honywood* (a) Upon the strict rule the Court would not withhold the relief upon the head of mere accident, still less where the difficulty arises, not from mere accident, but from the conduct of the party himself: Sir *Hugh Middleton* having put his moiety into such a number of Assignees, that it is totally impossible to sue them individually That entitles the Plaintiff to the remedy in this Court. The doctrine, that, where by accident the remedy for a rent is lost at Law, relief may be had here, is very old:

(a) 1 *P Will.* 328

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Thorndike v. *Allen*. (b) *Eaton College* v. *Beauchamp and Reeds*. (c) *Davy* v. *Davy*. (d) *Cranborn* * v. *Crisp*. (a) The anonymous case in *Precedents in Chancery*. (b) *The Duke of Bridgewater* v. *Edwards*. (c) *The Duke of Leeds* v. *The Corporation of New Radnor*, (d) in which the preceding cases are collected. These authorities establish the prin-
[* 433] ciple, that, where by accident, or the lapse of time without default, the legal remedy for a rent is gone, not absolutely, but so far, that it is morally impossible to obtain it, the jurisdiction in Equity arises. It is difficult, with reference to this principle, to distinguish the case of lands intermixed from this, of property split and divided into so many parts, that it is impossible to proceed against each individual proprietor. a confusion of proprietors, arising from the party's own act, making this jurisdiction absolutely necessary to answer the ends of justice. Both the circumstances forming the reason in *The City of London* v. *Richmond*, (e) concur here: 1st, it is equally impracticable to make all these parties: 2dly, the difficulty is created by the act of the party, under whom the Defendants claim.

The Land-tax Acts are of very peculiar construction; but the true meaning is, that the Commissioners shall, by an assessment of 4*s*. in the pound, raise the sum imposed by the Act. The provision as to fee-farm rents turns upon this; that what is raised shall be borne in proportions by the holder of the rent-charge and the owner of the land; and the decision in *King* v. *Weston* (f) was accordingly. But this is not a fee-farm rent, or a rent of any kind, but a species of Annuity, arising out of this
[434] transaction between the Crown and Sir *Hugh Middleton*, having reference only to a trust estate.

Mr. Romilly, and Mr. Martin, for the Defendants, individual proprietors of shares in the King's Moiety.—Three questions arise: 1st, whether this Plaintiff is entitled to relief in Equity? 2dly, if he is, whether all the proprietors of the King's moiety ought to be before the Court? 3dly, whether the Plaintiff is not bound to pay 4*s*. in the pound upon his rent? This Plaintiff is not entitled to relief in the suit, and against the parties, in which and from whom he seeks relief. The Corporation are trustees only for the proprietors of the King's moiety; not for the Plaintiff. The Corporation have vested in them the legal estate in the whole of this great adventure; of which they are entitled

(b) 1 *Ch. Ca.* 121.
(c) 1 *Ch. Ca.* 144.
(d) 4 *Bro. P. C.* 139.
(a) p. 433. *Finch*, 102.
(b) *Pre. Ch.* 592.
(c) 4 *Bro. P. C.* 139.
(d) 2 *Bro. C. C.* 338. 518.
(e) 2 *Vern.* 420. *Pre. Ch.* 156. 1 *Bro. P. C.* 30.
(f) 2 *Eq. Ca. Ab.* 62. See 3 *P. Will.* 127. Note *b*.

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to a moiety themselves; holding the other moiety for the grantees of the Crown. Their duty requires them merely to pay the land-tax upon the whole, and then to pay a moiety of the profits to the persons entitled to the King's moiety, having no immediate privity with the Plaintiff; so as to raise a trust, having paid him only as agents. The case of the Corporation of *New Radnor* (*a*) has no analogy to this. Where the object is to have a charge paid out of land, the Plaintiff must bring all the proprietors. That is the foundation of the equitable jurisdiction, for if the remedy by distress is adopted, a right to contribution arises. At least it was incumbent upon him to bring forward all whom he knew to be proprietors. The objection, that the difficulty was created by the party himself, Sir *Hugh Middleton* dividing the share among such a number of persons, would apply to every case: that, for instance of a man having an estate, charged with a rent, splitting the estate, so that it became divided among many proprietors: in which, however, it has been held necessary to bring all the proprietors, as parties. But the person carving out all these interests, was Sir *Hugh Middleton*, not the *New River* Company. The case in *Precedents in Chancery* (*a*) was a bill on behalf of the Plaintiffs and all other proprietors of a very great adventure, except the Defendants, and they might have come in at any time, upon the principle of a bill by creditors on behalf of themselves and all others. An instance must be shown of a bill against particular individuals; where there were a great many others, against whom the Plaintiff had precisely the same equity, and relief given against some, not against all, even whom the Plaintiff was aware of; with a view to contribution among them. Many instances occur of a right without a remedy. The case of *Drury Lane* Theatre (*b*) was an instance, if all the points had been pressed, the number of persons concerned being so great, that it was impossible to bring them all before the Court. The Court does not admit the abstract proposition, that a wrong without a remedy can subsist, but points out particular parties; and requires them to be brought. The reason is the inconvenience of the remedy. [435]

But in this case it is absolutely necessary to bring before the Court all the proprietors. Some may be in circumstances perfectly distinct from all the others. Some, for instance, may have redeemed the land-tax: the proprietors of *New River* shares being allowed (*c*) to redeem [436]

(*a*) *The Duke of Leeds* v. *The Corporation of New Radnor*, 2 *Bro. C. C.* 338. 518.

(*a*) p. 435. *Anon. Pre. Ch.* 592.

(*b*) *Ante*, vol. vii. 617.

(*c*) Stat. 42 *Geo.* 3. c. 116. s. 13.

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each his own individual share. As to the rest there must be a reduction every year, in proportion to what has been paid by the Plaintiff's interest: but as to those, who had redeemed, such reduction should not take place. In the account therefore the share of this rent-charge to be paid by those, who had not redeemed, would vary every year: not so as to the others. One, who redeemed in 1798, must have it taken as it was in that year: another, having redeemed in 1799, as it was in that year. It is necessary, upon these questions, that all these persons. interested, should be before the Court: the proprietors not having in themselves any legal estate, are not trustees for any person. Unless a covenant runs with the land, the Plaintiff has no right against any particular individual. The principle, upon which all parties are to be brought before the Court, to prevent multiplicity of suits, would not be attained upon this bill, on account of the right to contribution among these proprietors. The only effect would be to impose upon the Defendants the very difficulty which the Plaintiff would avoid.

Upon the merits, this rent-charge is a fee-farm rent, payable to the Crown, within the Land-tax Acts. As between the King and the representatives of Sir *Hugh Middleton*, it must upon the covenant in the grant of *Charles* I. be considered a fee-farm rent still existing in the Crown, and then clearly upon the Acts of Parliament the land-tax is to be assessed at 4s. in the pound: that is, the owner of the property is entitled to make that reduction, at the same rate, at which the land is assessed. A certain sum of money is to be raised in each division, when the land-tax is at 4s. in the pound; and a less sum, if less than 4s. It is left to the proprietors to make the assessment. It happens in many parts of the kingdom,

[437] that, when the tax is at 4s. in the pound, the assessment is at 2s or less. *King* v. *Weston*, (a) is the only decided case, establishing, that the deduction from the Annuity is to be in proportion to the assessment upon the land. But it never was decided, that as a valuation less than the full valuation is given in, the land being assessed at much less than 4s. in the pound, therefore the owner of the rent is to be assessed at 2s. only, or less. The greatest inconvenience would ensue: a total uncertainty; and a new account must every year be taken of the profits of this great adventure. A profit, arising from the payment of small rents, liable to an increase of rents by the erection of new buildings, and to loss by the failure of tenants, cannot be the same in any two years. Suppose the profits of the Company reduced in consequence of any

(a) 2 Eq. Ca. Ab. 62.

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calamity by fire: the owner of the rent would not participate in that loss, as long as 500*l* was received in the shape of profit. Whether this case is put upon mistake or fraud the Plaintiff is not entitled to relief in Equity: if upon fraud, he comes for a proportion of the spoil: if upon a mistake, giving an advantage to all the proprietors, he claims his proportion, admitting, that, if the event had been different, he would not have borne any loss.

Mr. Hart, for the New River Company.—The objections are, first, to the jurisdiction upon this subject: 2dly, whether the persons interested are brought before the Court, so as to enable the Court to decree upon the rights of all parties: and 3dly, upon the title of this Plaintiff. Legal rights, and the complication of them alone, do not raise an equitable jurisdiction. This is argued upon the case of a legal right, which cannot be pursued at Law. [438] The proposition is true, if applied to the loss of evidence of the right, and to other cases, where the Court exercises a concurrent jurisdiction, giving complete relief; having originally taken jurisdiction upon the ground of accident. But in this instance there is no such ground of jurisdiction. The representatives of Sir *Hugh Middleton* would have one ground of equity against the Company; that one tenant in common may consider the other, taking the whole profit, as his bailiff: but in such a case the Plaintiff must show, that they are tenants in common. In order to raise a trust there must be some privity. Nothing has ever taken place, constituting any relation between the Company and this Plaintiff, making them trustees for him. He is not therefore a *cestuy que trust*, in the pure sense; and if he can, through Sir *Hugh Middleton*, be considered as having an equitable lien, the Company cannot be described as trustees, but are mere stake-holders. Then can the Plaintiff come into Equity against the stakeholder in the absence of the persons interested to resist him? In *Quintine* v. *Yard*, (*a*) all the parties in substance were before the Court; as all might have come in after the decree; as Plaintiffs in effect, and embracing all the interest in the subject. *The City of London* v. *Richmond*, (*b*) is accounted for in the same way; and the Court compelled them to bring the persons legally accountable, but not as to the equitable subdivisions; as the assignee of a mortgage is the only necessary party; and the mortgagor is not obliged to bring all the persons, among whom the interest is subdivided, being only subordinate equities, which the Court does not notice. But in this case the Proprietors are primarily accountable.

(*a*) 1 *Eq. Ca. Ab.* 74.
(*b*) 2 *Vern.* 420. *Pre. Ch.* 156. 1 *Bro. P. C.* 30.

1805. Many of them, if before the Court, might suggest equities, with reference to their own acts, upon which, even
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[*439] *Mr. Richards, in Reply.*—The rule, requiring the presence of all parties, is a mere rule of convenience, which does not prevail at Law, and gives way accordingly, as in the instance of the executor, having in himself all the interests of the testator, no other party therefore being necessary. In general the case of a trustee is different: the persons interested in the trust, if specifically pointed out, are frequently considered necessary parties. In the case of a creditor's bill, on behalf of himself and others, no creditor, who is not upon the record, can litigate the question at the hearing: no other can intervene without an express order, which will not be made, unless it appears that the Plaintiff has neglected his duty: yet all creditors are bound, and the most important questions may be decided in their absence. So to a bill to establish a custom all persons interested are not necessary parties; yet all are bound. The principle is convenience. The Court, having a few of the persons interested before it, interested to sustain the question, is in general satisfied. Upon the record there are parties to sustain the question; and the possibility, that something further might be urged by some of those who are absent, shall not stand in the way. Upon a bill against a trustee the Court will, though some of the *cestuy que trusts* are proved to be abroad, if there are persons before the Court to sustain the suit, make a decree to the extent of a decision against the person to pay, though not ordering the persons absent to do any thing.

[440] As to the jurisdiction, this is an equitable charge: the legal interest in the Corporation. The Plaintiff is entitled without reference to the construction of the Land-tax Act: but, if not, the construction of the Act is in his favour. This is not really a rent, though it is called so. It is derived, not out of a conveyance of land, but from a grant of fines and other profits arising from an adventure. The Corporation has in itself the whole legal interest in the land, and the whole adventure. The profits, to be divided are personal property; arising certainly from an adventure connected with land, but a speculation, expected to produce profit. They are to settle the account, and to hand over a moiety of the clear surplus. The only way of getting at it is a bill. An action of account would not lie. Since the Land-tax Act the Corporation are to deduct the land-tax, as a necessary out-going. Still it is

purely a question of account: a moiety of the profit, subject to the land-tax; but nothing more than a division of profits: not a rent, properly, which originally was confined to payments out of land. Personal property is by the Land-tax Acts charged at 4s in the pound A sleeping partner is entitled to see, what the proportion is. If, instead of a share of the profits, he is to have a clear sum of 500*l* a-year, the whole imposition of any Parliamentary tax is not to be thrown upon that interest. but it must be in proportion to the other part As to the objection from want of privity, the Company are parties to the deed between the King and Sir *Hugh Middleton*.

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But, if this is to be considered a fee-farm rent, or a rent-charge, the Plaintiff is entitled to relief within the view of the Act of Parliament It has not been in fact in the Crown since the time of King *William* III, and as the King's grantee has always been considered entitled to take it, it must be taken to be completely out of the Crown. Considered as a general rent-charge under the Land-tax Act, the true construction is, that the Plaintiff is not to be charged with more than a fair proportion. [441] The object of the Legislature was to throw the burthen equally upon all the objects of the duty, and therefore the landlord is allowed to deduct out of the rent-charge a proportionate part of the tax, paid by him, and that proportion ought to be regulated by the fair value of the land, not, as is contended, by the actual assessment, however unequal. The assessment is upon all persons, having a share or interest: a description, that applies to this Plaintiff. Then, the full sum of 4s in the pound not being raised from these persons, he is entitled to the benefit of the abatement The intention of the Legislature being to charge all property in proportion to its value, as far as can be done, it is unconscientious, that he should pay 100*l*. out of his 500*l*. in ease of the assessment upon the Company, paying no proportion.

The Lord CHANCELLOR —The answer admits, the profits of the Company have been much greater than 18,000*l*. a-year, the sum, at which they are assessed, but does not disclose how much greater If neither the Plaintiff nor the Defendants pay to the public what they ought to pay, is this Court to administer the equities between them? My opinion is, that in such a case a Court of Equity ought not to act.

The Lord CHANCELLOR --The answer of the Company admits, that their profits are more than 18,000*l*. a-year, *Aug*. 1.

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the rate of their assessment. The Plaintiff has compelled them to state that fact, but has not proceeded to ask, what that excess is. * If he had, the Court could by decree upon the admission have set the thing right without a reference to the Master. But there was a mutual convenience to both in refraining from that question. The meaning of the [* 442] Act being that they should pay 1s. in the pound upon the whole amount of the actual profit, if that had been published, this bill might operate relief for the present year, but the effect would be, that in future the Plaintiff would not have reason to complain, if the Commissioners under the Land-tax Act should do their duty; for as by the Act this property is not to be assessed by a pound rate according to the deficiency of a primary assessment upon the personal estate, but a rate of 4s in the pound is imposed directly upon the land, the Plaintiff, paying no more than that, would have nothing to complain of.

The equity therefore, which is stated, is this. The Plaintiff does not pay more than he ought, if they were duly assessed: but, not being duly assessed, they did not inform the Commissioners, what is the correct sum of their profits: the Plaintiff therefore desires a Court of Equity to assist him, to relieve him, not from paying more than he ought to pay, as between him and the public, but from what he has paid to the Company; as they have paid less than they ought to pay, if the Act had been put in execution; as it would have been, if the Commissioners had the means of enforcing a discovery of the whole profit. The Company are entitled at Law under the instruments to receive in the first instance the whole profits. Afterwards, in consideration of the expense the King had been at in the work, they grant to him one moiety of the rents, profits, and gains, made. So it must be a *chose in action*. Still they remain the legal owners of the whole concern, entitled to receive all the rents and profits; but, having granted a moiety, bound to account [443] for that to the King, and after that grant the King could in Equity, or a Court of Revenue, compel an account; which would embrace all the expenditure, as well as all the gain, that had been obtained. After that the King granted his moiety, by an instrument, to which the Company were parties, to Sir *Hugh Middleton*; who covenants to pay to the King, his heirs and successors, this rent, now vested in the Plaintiff.

One moiety of the profit, subject to the covenant for payment of 500*l.* *per annum*, being vested in Sir *Hugh Middleton*, it is clear, if that Annuity is subject to equitable jurisdiction, it was competent to the Plaintiff to bring into a Court of Equity the Company and Sir *Hugh Middleton*; to ascertain a moiety of the profits, and out of

what subject, constituting that moiety, the 500*l.* *per annum* was to be paid. The acts, since done by Sir *Hugh Middleton*, are of this nature. That moiety, vested in him, either expressly subject by lien, or only by covenant to the sum of 500*l.* a-year, has become the property of an infinite number of proprietors, and the ownership split into so many shares, that, the Company, if called upon by some proprietors on behalf of themselves and all others, would not know with which they were contending, until all the proprietors had shown themselves by claim in the Master's office.

It is insisted, that the Plaintiff cannot sue in Equity without bringing before the Court all the proprietors of the King's share, as well as the Company, whose share is also subdivided: but those parties are represented; and it is clear, no objection of that kind arises as to them. The rule is urged, that, whenever a rent-charge is granted, which I will suppose capable of being recovered specifically out of the moiety of the profits, all persons, who have to litigate any question with regard to the title to that rent-charge, or with each other, as being liable to pay the whole, or to contribute among themselves, must be brought before the Court, and there is no doubt, generally, that is the rule. The consideration is very different, if it is necessary to decide this point, whether it is possible to hold, that the rule shall be applied to an extent, destroying the very purpose, for which it was established: viz. that it shall prevail, where it is actually impracticable to bring all parties, or, where it is attended with inconvenience, almost amounting to that, as well as where all can be brought without inconvenience. It must depend upon the circumstances of each case: but, upon all the authorities, for the purpose of getting a decree, it is not necessary to bring all parties interested. I do not go into the case of bond creditors and all the other cases; and I lay out of my consideration the case of persons, suing on behalf of themselves and all others; for in a sense they are before the Court. There are authorities to be found in print, that where it is impracticable, the rule shall not be pressed, and in such a case as this, the King's share being split into such a number of interests, that it is impracticable to go on with a record, attempting finally to bring all parties, having interests in the subject to be charged, I should hesitate to determine, that a person, having a demand upon the whole and every part of the moiety, does not do enough, if he brings all whom he can bring.

There is one class of cases, very important upon this subject: viz. where a person, having at Law a general right to demand service from the individuals of a large

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1805. district, to his mill, for instance, may sue thus in Equity. His demand is upon every individual, not to grind corn for their own subsistence except at his mill. To bring actions against every individual for subtracting that service is regarded as perfectly impracticable. Therefore a bill is filed to establish that right, and it is not necessary to bring all the individuals. why? Not that it is inexpedient, but, that it is impracticable, to bring them all. The Court therefore has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the Plaintiff, and, when the legal right is so established at Law, the remedy in Equity is very simple; merely a bill, stating, that the right has been established in such a proceeding; and upon that ground a Court of Equity will give the Plaintiff relief against the Defendants in the second suit, only represented by those in the first. I feel a strong inclination, that a decree of the same nature may be made in this case.

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It has been, with great force, observed for the Defendants, that in this way the same difficulty is put upon them: how are they to obtain contribution, if the Plaintiff cannot ascertain the persons who are to contribute? But I am disposed to think, in a case under such circumstances as this, the whole legal interest in the Company to distribute the fruit of that interest according to the equitable rights, a bill might be filed by the Plaintiff, stating, that the Company have the legal interest; that they have to distribute the profits among the persons representing their Company, and those, entitled to the King's moiety; that therefore they object to account with him unless there are proper parties; and it would be competent to the Court in such a state of circumstances, to say, if the Plaintiff brings so many of those, who represent the King's share as can be taken duly and honestly to enter into that contest, in which all the others are concerned, that ought in Equity to bind those, who are present, representing those, who are absent; giving the Company a right to make the deduction under that decree.

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I incline also to think, it will be found, that relief may be given in Equity in respect of this Annuity, as affecting in Equity the moiety, which belonged to the King, upon the cases I have seen. Supposing, they were duly assessed at 4s in the pound, and their profits were a great deal more than the sum upon which the assessment was made, the Plaintiff paying 4s in the pound, in the terms of the Act, by a like pound-rate, I must, if the case turned upon that point, have made a case for the opinion of a Court of Law. I know opinions have been given with great confidence, that, though the pound-rate

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both upon the land and the Annuity, was 4s. in the pound, yet inquiry might be made into the actual value of the land, not only where it could be ascertained under the clause, relating to landlords mediate, or immediate, whose property was out to tenants, but also, where the value might be ascertained in the party's own occupation: the meaning of the Act being, that you may ascertain the value from year to year, and therefore may claim a reduction of the Annuity, having regard to the value. Opinion, very different has been held with equal confidence, that if the land is [illegible] much less, with the [illegible] perhaps [illegible] the Annuity is to [illegible] the terms of the Act [illegible] value of the Annuity [illegible] pound rate as the land. There is no actual de- [illegible] I imagined there was, and the [illegible] upon the Act. It [illegible] therefore, the most just way could have [illegible] for the opinion of a [illegible] of Law.

[illegible] upon the best consideration I can give this case, [illegible] is so considerable. [illegible] for giving relief under all [illegible] is great difficulty upon the [illegible] many of these individuals have re[illegible] land tax upon the foot of the rate paid by [illegible] if they were hereafter to be as[illegible] they could have no reason [illegible] it was their own fault to permit [illegible] their own body, to redeem upon [illegible] But the difficulty is, that this is not the [illegible] under the Act of Parliament, [illegible] under the due construction of the [illegible] such a rate as ought to be applied, having regard to the mode of assessing in the district. but there being an express clause, that the profits shall pay 4s. the Plaintiff must admit, that his Annuity, if part of that profit, is tax[ed as it] ought to be. If it remained in a chest, and the Commissioners assessed it there, according to the express clause, he could not receive it without that deduction of 4s. in the pound. The question then is, whether the Plaintiff, stating, that he has paid no more than he ought, has an equity to call upon other persons, who have paid less than they ought, and to have a declaration, that he is entitled to a participation in the effect of the circumstance, that by their not disclosing the actual profit, with the fact, perhaps, that the Commissioners cannot compel the disclosure, other persons, having an interest, have not paid as much as they ought. My opinion is, that the Plaintiff has no such equity; and no decree can

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1805. be made upon the principle, that he, who has paid only as he ought, is to participate in the gain of those, who from circumstances have paid much less than they ought.

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The bill was dismissed without costs.

[448] THE EARL OF RADNOR v. SHAFTO.

Aug. 7.

A right of pre-emption given by will, whether at a price expressed or to be fixed by the trustees, will be executed; the construction in the latter case being a reasonable price, to be ascertained by reference to the Master.

But to pass such right to the heir or devisee the intention to accept the offer must appear by some act, or, at least by will. In this case, the will directing, that A. or whoever shall after the testator's decease be entitled to estates in settlement may have the refusal, A having died without showing such intention, and a tenant for life of part of the settled estates, not by the settlement, but under a recovery by A not answering the description, it was held, that the right did not then exist in any one

SIR *CHARLES DUNCOMBE*, by a settlement, dated the 7th and 8th of *June*, 1708, settled his freehold estates in the Counties of *Wilts* and *Middlesex*, to the use of himself for life, remainder to his first and other sons in tail male, remainder to his nephew *Anthony* Lord *Feversham*, for life, and to his first and other sons, and to *Thomas Brown*, (afterwards *Duncombe*,) and his sons in the same manner. Sir *Charles Duncombe* died in 1711, without issue male; leaving his nephew Lord *Feversham* surviving him, who entered, and died in 1763, without issue male; and upon his death *Thomas Duncombe*, eldest son of *Thomas Brown*, became entitled to the settled estates.

Lord *Feversham* left at his death two daughters: Lady *Radnor* and *Frances Bouverie*, his coheiresses at law. By his will, dated the 21st of *July*, 1757, he devised his several estates in the Counties of *Wilts*, *Middlesex*, and *Leicester*: upon trust, subject to Annuities and other charges, for his children, as therein mentioned, in case he should leave daughters only, and there should be more than one, to convey to all and every his daughter and daughters, equally to be divided between them, if more than one, share and share alike, as tenants in common, upon their severally attaining twenty-one, and the respective heirs of their bodies.

[* 449] The codicil, dated the 22d of *April*, 1761, contained the following clause:

"I do hereby further direct and order, and it is my "mind and will, that in case I shall leave no son and more "daughters than one, that then my trustees *John* Lord "*Willoughby De Broke*, *Francis Walwyn*, *James Hayes*, "and *Charles Moss*, and the survivors and survivor of "them, and their heirs, executors, and administrators, do "and shall and I do hereby give them full power to make

"sale of all my estates in *Wilts* and *Middlesex*, over which 1805.
"I have a disposing power, whether the same be freehold,
"leasehold, or copyhold, for the benefit and advantage of
"my said daughters: and to prevent any disputes or dif- The Earl of Radnor v. Shafto.
"ficulties that is obvious to foresee may arise hereafter
"between or among them in the partition of the same, I
"do hereby desire that my kinsman *Thomas Duncombe*,
"Esq. or whoever shall after my decease be entitled to
"the estates settled by my uncle Sir *Charles Duncombe*,
"may have the refusal of them, and if he or they should
"not signify his or their consent in writing to one or
"more of my said trustees within three months after my
"said trustees shall have signified to him or them the
"price or terms upon which they are willing to convey
"to him or them the said estates, that he or they are
"ready and desirous to purchase all the estates altoge-
"ther at the price or upon the terms so fixed by my said
"trustees, then and in such case I do hereby direct my
"said trustees to sell the same estates altogether or in
"parcels as they shall judge to be most for the advantage
"of my said daughters, to the best purchaser or pur-
"chasers they can get for the same." The testator fur-
ther directed, that all the money to arise from the sale, and all other advantage therefrom, should belong equally to his daughters.

After the death of the testator, *Thomas Duncombe* entered into possession of the settled estates, suffered recoveries, and limited the estates to himself in fee. By his will, dated the 7th of *July*, 1778, he gave to trustees all his estates in the County of *Wilts*, together with his other estates in the Counties of *Hants*, *Bucks*, and *Bedford*, to the use of his first and other sons in tail male; and, as to the estates in the Counties of *Hants*, and *Wilts*, with remainder to his daughter *Ann Shafto* for life, remainder to trustees to preserve contingent remainders; remainder to *Robert Shafto*, her second son, *Thomas* the third, and lastly to *John*, her eldest son, for life, successively, and their first and other sons successively in tail male, and to his daughter *Frances Duncombe* and her first and other sons, remainders over, and the ultimate remainder to the testator in fee. The testator *Thomas Duncombe*, died in *November*, 1779, leaving *Ann Shafto* and *Frances Duncombe*, his two daughters, and no male issue. *Ann Shafto*, or her husband *Robert Shafto* in her right, entered upon the estates devised to her for life. She died upon the 16th of *March*, 1783, leaving *Robert Eden Duncombe Shafto*, her second son, tenant for life under the will of his grandfather. *Frances Duncombe* married *George Henry Rose*. They had issue a son, the first tenant in tail under the will of *Thomas Duncombe*, *Robert* [450]

1805. *Eden Duncombe Shafto* and his surviving brother not having at present any issue, and the other being dead without issue.

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The question arose upon the right of pre-emption under the will of Lord *Feversham*, claimed by the Defendant *Robert Eden Duncombe Shafto*, individually, and also by the Defendant *Mrs Rose*, jointly with him.

[451] *Mr Fonblanque, and Mr Bell, for other Defendants, resisting those Claims.*—This Court will not give the right of pre-emption, but will direct a sale, generally, in its usual course. Where a sum is limited by the party, the case is different: but how is the Court, except by competition, to find out the fair price; the more difficult to ascertain from the particular situation of the estates, in the neighbourhood of the Borough of *Shaftesbury*? Such a right of pre-emption cannot be considered a valuable interest, to go with the estates. The will cannot be construed to give any kind of right, to be enforced in Equity. The Court will sell the estate at the full value; and the true mode of attaining that is by auction.

Mr. Piggott, Mr. Richards, and Mr. Leach, for the Defendant, Robert Eden Duncombe Shafto.—The right of pre-emption, given by this will, is as much a trust as the sale of the estate, which is given to trustees for the sole purpose of selling it. It was competent to the testator to direct the mode of executing the trust; and beyond the primary object, to provide for his two daughters, and to prevent disputes between them, to give any advantage to any other person. This power of pre-emption is conditional; depending upon two events described, in case the testator Lord *Feversham* shall leave no son, and in case he shall leave more daughters than one. The object was to give a personal benefit, connected with the estates described: viz. those settled by Sir *Charles Duncombe*, affording an opportunity of annexing those estates to others, with which they were intermixed, belonging to the testator. This Defendant, being in possession of those estates, answers the description: the right being connected with that possession, and being given by a person, who could not be
[452] ignorant, that *Thomas Duncombe* was tenant in tail and could make the estate his own, as he did.

The Lord CHANCELLOR.—Suppose, *Duncombe* had died a fortnight after the death of Lord *Feversham*: and had left an infant son: what could have been done in that case?

For the Defendant.—Incapacity would have the same effect as refusal. The Court might guard this part of the trust by directing the Master to put a price upon the

estates, who might take the opinions of competent persons, and advert to every circumstance that would affect the value. The testator must have been aware of the difficulties, if any exist. The trustees may safely fix a fair price; adopting the best means they can. The right of refusal is a valuable interest, and the trustees are bound to execute that direction in the will: or the Court, if the trustees are not able, and the difficulty cannot be an objection. 1805. The Earl of Radnor v. Shafto.

The Attorney-General, for the Defendant Mrs. Rose.—The right of pre-emption is in the Defendants *Mrs. Rose* and *Mr Shafto*, the heir of *Thomas Duncombe* being the person entitled to the benefit, intended, and to have the offer made to him at the death of the testator. Such a right will be carried into execution by the Court. There can be no doubt, the testator might have given the right of pre-emption at less than the value, expressing that purpose by his will, and this direction to trustees to tender the estate at the price, at which they may value it, is not very different. The testator must in both cases be taken to intend to give a benefit, and if difficulties occur, they are raised by himself. The circumstances, connected with the particular situation of the estates, cannot have any influence. [453]

Mr. Fonblanque, in Reply.—The Court must let the subject of the sale find its value through the medium of the Master. I admit, this implies a benefit: not, however, a personal benefit, or of a pecuniary nature, but a mere local advantage. The person intended is evidently the person, in possession of the settled estates. It cannot be supposed to possess a descendible quality: so as to go to a mere stranger, if recoveries should be suffered.

The Lord CHANCELLOR.—Having had doubts upon this will for 20 years, there can be no use in taking more time to consider it (1). It is contended, that there was convenience in selling under the practical effect of the power of pre-emption, though it should not bring the estate quite up to the price another mode might reach: but some benefit might in that way be derived to the daughters from the circumstance, that partition would not take place, and the benefit looked to was avoiding that inconvenience. The testator in the terms he has used in the event, that the option was not accepted, supposed, there might be a more advantageous mode than a sale to one person: viz. a sale in parcels: yet at the expense of that advantage to his daughters he proposes this

{(1) See *Maddock's Chancery Principles*, &c. vol. i. pref. p. viii.}

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right of pre-emption, attended with the inconvenience, that might accompany the sale of the whole together. It was therefore within the scope of his professed intention, that there might be a sale less advantageous by the mode which he has pointed out in the first instance, than in the second. That circumstance, therefore, that it might be [454] less advantageous would not authorize the Court to repel the purpose.

It is stated broadly, that this Court would execute a will, proposing a right of pre-emption, and there is no doubt, a will may be so constructed as to give a right, which the Court would unquestionably execute. Suppose the case, that has been put by *The Attorney-General*, a recital in the will, that the estate is valued at 30,000*l.* with a direction, that it should be offered to a particular person at 30,000*l.*: clearly this Court would act. In that case, however, the testator himself has given the Court the easy means of acting, and executing his purposes. The question in this case is, whether, the testator having directed the trustees to offer the estate at such price and upon such terms, as they may think proper to fix, the Court, will, if the trustees will not act, place itself in their stead; and before the Master fix a price, at which the estate shall be offered to the person, who in that way of putting it seems to be an object of the testator's favour. Upon that question there would be no difficulty or inconvenience. If the testator ordered the trustees to put a reasonable value upon the estate, and to offer it to a particular person at that value, and they die, or refuse to act, the Court might direct a reference to the Master to fix the value, and execute the trust by proposing the estate to him at that value; and, if he did not accept the proposal, putting it up to a public sale. If therefore there is an objection in this Court to executing a will with a right of pre-emption, that must arise, not out of the general doctrine, but the terms of that will, which the Court is called upon to execute. I incline upon the whole to think, first, that if the nature of the property will not alter the rule, the difficulty of executing the trust ought not to alter it; and, if it was necessary to decide upon [455] this ground, that a reference ought to be made to the Master to fix such price and terms, at which the trustees ought to have offered the estate; taking care, that the ground and information, upon which the Master proceeded, should be communicated to the Court; in order to ascertain, that the trust was as beneficially executed as the nature of it would allow.

But my judgment upon this case is, that, under the circumstances that have taken place, no one is entitled by this will to the right of pre-emption proposed. In the

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case, that has been put by *The Attorney-General*, of an estate, worth 50,000*l.* offered to a particular person at 30,000*l.* and the other case, where the testator directs the trustees to make an offer at a reasonable price, to be fixed by them, the Court possibly to one intent would hold either will to amount in substance to a devise of the estate itself, if that person would accept it upon those terms: but, if the effect of the option could be construed as high in either case, that person must in his life do some act, denoting, that he accepts the benefit: or the Court cannot consider him as being in the same circumstances, as if he had made a contract for the purchase of the estate. In this instance, if *Mr. Duncombe* had accepted the offer, and done any act, denoting that purpose, even by his own will, it might have been compared to the case of contract: but if that person dies without doing any act, it cannot be said, that the case is the same as if he had contracted for a purchase, or, that his real representatives could call upon his personal property to pay for that estate, as if it had been contracted for.

My idea upon the whole will is this, the testator thought, that during his life he had by his interest in these estates such a power over the rights of disposing in those, who were to come after him, that the settlement of those estates would remain undisturbed at least until his death; [456] and therefore makes the proposal in terms, by which I think he intended to connect these persons, the estates, and the settlement together; with reference to any option he meant to propose to any of them. His object was to throw into that course of devolution these estates; if the parties, entitled to the estates in settlement, chose to take them in that course, created by the settlement of the estates, to the owners of which he intended to give this right of pre-emption I think, the point, made by *Mr. Rose*, more hopeful than that of *Mr. Shafto*. *Thomas Duncombe*, as the person connected with the estates in that settlement at the death of the testator, being the person, who had an option, but only an option given to him, I do not know, that he might not have done some acts during his life, that would have bound his heirs. If he had recited in his own will an offer at such price as the trustees would dispose at, that is, a reasonable price, which would I think, be the construction this Court would put upon the power of the trustees, and had declared by act in his life, or by will, that he would accept it upon those terms, I do not know, that in that case the estate would not have descended, or passed by his devise, and his personal representative must have paid for it. But, if a testator goes no further than to propose by his will an offer to a particular person at a price, to be fixed by his

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trustees, and that person does no act in his life, signifying what he will do, I do not conceive, the interest he has can be longer than his life, or, that it will descend to his real representative, to be paid for by his personal estate.

Mrs. Rose and *Mr. Shafto*, therefore, have not at this moment the right of pre-emption. On the other hand *Mr. Shafto*, as a particle of those, taking the settled estates, [457] viz. tenant for life of some, and having no title in the others, and not claiming those, which he has under the settlement, to which the testator looked as the means of connexion, does not answer the description of the persons entitled to the settled estates. When the will was made, the testator had no idea that *Mr. Duncombe* had any power of affecting the remainders to him and his issue male after the death of Lord *Feversham*. But *Duncombe* might by a fine have created a base fee in himself, or might have sold that base fee to a stranger, who would have said, he was in possession of the settled estates. *Duncombe* however would have answered, that the benefit was intended for him individually, and this Court would not have held that stranger intended to have this right. Though there is difficulty from the phrase, the testator must be taken to mean such person, as at the time of his death, or from time to time after his death, should be entitled to these estates, settled under that settlement, to which he was looking, when ascertaining, who were the individuals, who after his death would take those settled estates. It is said, you are not to look at a will with reference to circumstances that do not exist, in order to determine, what is to be the result under the circumstances that do exist. But in trying the meaning of phrases in the will you may look at all the circumstances, in which the Court might have been called upon to determine the meaning of the same phrases, applied to a different state of circumstances. If these estates had been sold to five different persons, all strangers to the family, or to fifty, and the right of pre-emption is to go to those, claiming the property by this sort of alienation, not under the settlement, in whom would it have been the five, or the fifty, perhaps the estates made the subject of different settlements? All that is to be considered. Another difficulty occurs * upon the circumstance that *Mr. Shafto* is only tenant for life.

In trying the meaning of phrases in a will all circumstances may be looked at in which the Court might have been called upon to determine the meaning of the same phrases applied to a different state of circumstances.

Upon the whole this right of pre-emption does not exist in any one at present. It is not necessary to say, what [* 458] the Court will do with rights of pre-emption in general, when that question may arise. This case does not call for a decision upon it.

1805.

July 31.
Aug. 3. 17.

VANCOUVER v. BLISS.

THE bill prayed the specific performance of an agreement for the sale of an estate by the Plaintiff to the Defendant.

The Defendant by his answer, among other objections, represented, that the particular was false, first, in stating, that the whole estate, consisting of 1400 acres, is tythe-free, except about 74 acres, for which a composition of 50s. *per annum* was paid, and a parcel of exchanged land, consisting of 61 acres and a half: 2dly, in stating that only six tenants of the Manor of *Hollesly cum Sutton* have a right to cut whins on about 400 of 700 acres of pasture; all the tenants of that and another manor, 60 in number, having such right: 3dly, 400 acres not being the freehold and inheritance of the * Plaintiff, as described by the particular; but consisting of a mere common, subject to the rights of common in the tenants of the Manors. The answer also stated, that the particular described the estate as capable of improvement, and that the Defendant took possession in consequence of the Plaintiff's pressing him to do so, without laying the title before any one; representing, that it was perfectly clear. The Master's report stated, that a good title could not be made to the estate; to which report exceptions were taken: 1st, upon the title: 2dly, that the Defendant having by his answer put in issue the question as to the right of common, and both parties having examined witnesses as to that before the hearing, the Master ought not to have received any further evidence. Against the latter exception it was contended for the Defendant, that the rule that a party cannot go into evidence before the Master, that might have been examined, or upon points, that might have been examined to, in chief, does not apply to these cases, on account of the injustice to the purchaser: the vendor being at liberty at any time before the report to produce evidence in support of his title. (*a*)

The exceptions were overruled, and the bill dismissed.

For the Defendant it was then insisted, that the bill

Costs in Equity in the discretion of Court, upon the circumstances: not following the event, by a positive rule, as at law; though *primâ facie* that is the course, and circumstances must be brought forward by the party, who fails (1)

In this instance, a bill by a vendor for a specific performance, the report being against the title, the bill was dismissed with costs, upon the circumstances the purchaser having taken possession at the instance of the vendor, representing the title to be perfect, though possession taken, generally, is of weight as to costs.

Upon a question of title, as to specific performance, further evidence may be produced on both sides before the Master. The Court looks at the answer upon a question of costs.

[* 439]

(*a*) *Jenkins* v. *Hiles*, *ante*, vol. vi. 646. *Wynn* v. *Morgan*, *ante*, vol. vii. 202.

(1) See *Methodist Episcopal Church* v. *Jaques*. *Nichols* v. [illegible] *tees of Huntington*, 1 Johns. Cha. Rep. 66. 166.

1801. should be dismissed with costs; which, it was observed, though generally in the discretion of the Court, are of extreme consequence in cases of this nature; and therefore it was much to be wished, that some rule should be laid down upon the subject. *For the Plaintiff*, it was insisted that the costs were entirely in the discretion of the Court, to be determined upon the circumstances of the whole case; and there was no general rule.

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[460] *The Lord* CHANCELLOR said, he did not know that there was any settled rule; though it was much to be wished; and permitted the point to stand for argument.

Mr. Richards, and Mr. Bell, for the Plaintiff, contended, that the bill should not be dismissed with costs; which are in the discretion of the Court, and it is not consistent with the general practice in Equity to give costs in such a case, embracing a great many questions of difficulty; and that there is no general rule, that a decree for specific performance on the dismissal of the bill shall carry costs of course.

Mr. Romilly, Mr. Hart, and Mr. Martin, for the Defendant.—Admitting, that there is not any certain, positive, rule as to costs in cases of this kind, but that they are in the discretion of the Court, that is not a capricious discretion, but is governed by rules. In a late case, *The Bishop of Winchester* v. *Payne*, (a) *The Master of the Rolls* gave the costs, not upon the circumstances of the whole case, but adopting the principle, similar to that at Law, that upon a bill for specific performance, if the title proves good, it must be taken, the Defendant paying the costs; and if the Plaintiff fails in establishing his title that also must be with costs. A strong case is required for refusing costs to a purchaser, who has filed a bill for a specific performance, and cannot have a title. In this case there are circumstances sufficient to induce the Court to give costs to the Defendant. But, independent of these

[461] circumstances, in the general case of an advertisement for sale, an agreement, and, as a title cannot be made, a bill filed, the purchaser cannot employ his money in the mean time: a suit is depending four years; and it turns out, that he cannot have a title, and then he is to look out for another estate. Is he also to bear the costs of a very long and expensive suit, occasioned, not by him, but by a long abstract, to be supported in this Court by parol evidence? A case of hardship upon a vendor, having had no reason to look into his title for a long time, and

(a) *Ante*, 194.

therefore having no suspicion of a defect, may occur. But on the other side the grossest injustice must be the consequence. 1805.

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This case however does not depend upon these general topics merely; but may be determined upon the particular circumstances. The Plaintiff advertised this estate as one to which he was absolutely entitled; holding out, that it is capable of improvement by the purchaser, as absolute owner. It turns out, that over a considerable tract he has only a right of pasture; and that upon his own purchase, a short time before, an allowance had been made to him on account of the nature of this property. As to costs, a Court of Equity will proceed, as far as they can, by analogy to the case of costs at Law; and there can be no doubt, that in such a case at Law all the expense, to which the purchaser had been put by the incapacity of the person contracting with him to perform the contract, would be recovered. Can any blame be imputed to the Defendant, resisting this suit, by which he has incurred great expense?

Mr. Hart added, that he conceived, there was a rule in this Court, as well as at Law, as to costs, that the party, who fails, shall pay costs; subject to this qualification, that in some instance the Court observing, that each party has been in some degree to blame, therefore will not give costs. [462]

Mr. Richards, in Reply.—If costs are to be given according to the rule of Law, there could be no discussion here upon the subject. But there is no rule in this Court as to costs. They rest in the sound discretion of the Judge; certainly not a capricious discretion. It always turns upon the circumstances; as in the late case of *White* v. *Foljambe*,(a) where your Lordship would not give the costs. The objection, that the estate was represented to be of an improveable nature, is answered by the fact, that the purchaser was on the spot. There is a great difference between a title, that a purchaser will be compelled to take, and a title, that he may safely take; as this is.

The Lord CHANCELLOR.—It would be a most satisfactory doctrine, if I was at liberty to say, that in any species of suit, the rule that prevails universally at Law, that the costs shall abide the event, was established in Equity; for frequently the most painful and anxious duty of a Judge in this Court is to execute well the judgment as to costs; depending more upon discretion than the merits: with reference to which the rules of Law and the principles of Equity guide you with much more certainty. But that has not been so decided in Equity: and I should

(a) *Ante*, 337.

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be sorry to see the rule of this Court altered; from the circumstance of making persons answer large sums in costs, where the demand, which is the object of the suit, is very small: a circumstance [* 463] frequently much to be regretted at Law upon moral principles. There must be some mode of settling the differences of men; and it is much better, that they should resort to Courts of Justice, than that their passions should lead them to other modes of terminating their differences.

As to the question of costs upon a suit in Equity for the specific performance of an agreement, if there is any rule that the person, who fails, shall pay costs, it is new to me. I think, in such a suit he, who fails, is *primâ facie* to be taken to be the person liable to costs, upon principles both of morality and justice, and those parties, who depend upon circumstances to govern the discretion of the Court in withholding the costs, have it imposed upon them to show the existence of those circumstances in a sufficient degree to cut down the *primâ facie* claim of costs. In the late case of *White* v. *Foljambe*, (a) which has been mentioned, *primâ facie* I should have thought, the party, who failed, ought to pay the costs: and the ground of my judgment, not giving the costs, was, that the question was a pure question of title; which raised very considerable difficulties in the minds of those, most capable of judging upon such a subject. There was nothing of previous representation; and the Court was only to give an opinion upon a point of Law; which it was very difficult for the parties to settle for themselves without something of judicial opinion upon it. That was a dry case of that nature.

What is the present case? The Plaintiff was in possession of this estate; and I take him, from the answer, which has been put in by the Defendant, to have been [464] convinced, that he had a title, which he might most confidently offer. The title upon the face of the deeds would have created great doubt in my mind: not, whether he had a title; but to what he had a title. He was led to a persuasion upon that, which is not correct, by the circumstance, that a former owner had taken upon him to alter the description of the premises from that, which had from the beginning stood in the title deeds. The particular held out a clear, indisputable title to an estate, of an improvable nature, consisting of 400 acres, represented to be all the soil and freehold of the vendor, with the exception, that 400 acres were liable to the right of certain tenants to cut whins. The vendor not only confides in that title himself; but, (for I am bound on the question of

(a) Ante, 337.

costs to look at the answer,) goes the length of recommending the purchaser to do that, which is frequently an answer as to costs; to take possession without any advice upon the title; and puts him in possession. Lord *Thurlow* says, that, if a purchaser will not wait, until the title is cleared, but will take possession, and put the vendor to all the inconvenience of the discussion, when he is out of possession, and the other has got it, that weighs much as to costs. But that weighs nothing in this instance; upon the terms of the contract, with regard to the future period, at which the title is to be made good: but, further, the vendor presses the purchaser to repose confidence in him, and not even take the opinion of Counsel upon the title. The purchaser, therefore, taking possession under those circumstances, is protected from the consequence, arising from the mere fact of taking possession in other cases, as to costs.

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It appeared before the Master, that this is not an absence of such a title as this Court will compel a purchaser to take. I am sorry to use that expression; recollecting a period, when no such words were used; when it was the office of the Court to decide, whether the title was good or not; and it was thought better, that the dry rule should prevail, that, if the title was good, the purchaser should take it, than that the Court should speculate upon the point, whether there was more or less difficulty in the title; and say in one case, he should take it; in another, he should not. The old course was, that if the parties were afraid of the decision, they appealed, and had, not a title absolutely indefeasible, but as good a warranty as could be procured. The departure from that course has been attended with great mischief The first instance is the case of *Shapland* v. *Smith*, (a) in which the single question between Baron *Eyre* and *Mr. Hett* was, whether there was a use executed or not, and the case sunk down into this state; that with so much difficulty upon the title a purchaser should not be compelled to take it.

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Mischievous consequences of the distinction, established by the case of *Shapland* v. *Smith*, between a title good or bad, and such as a purchaser will or will not be compelled to take

That case has been followed since (b) What is the consequence? It is scarcely possible to represent the difficulties that have arisen from it, especially in a period when persons, under the description of land-jobbers, are going about looking for these things, and persons improvidently enter into contracts with them. Whenever a contract is made for the purchase of land, though no doubt has ever been entertained upon the title, no one thinking of disputing it, if the purchaser has a good bargain, he overlooks all these objections, but, if he finds he

(a) 1 *Bro. C. C.* 75

(b) *Cooper* v. *Denne*, *ante*, vol. i 565 4 *Bro C. C.* 80 *Sheffield* v. *Lord Mulgrave*, *ante*, vol ii. 526. *Roake* v *Kidd*, *ante* vol v. 647

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cannot sell the estate as well as he wished, or cannot enjoy it to his satisfaction, the first thing is, that the abstract goes to some one for the express purpose of finding out objections; and opinions are given on both sides. I feel great concern for the owners of this sort of * property. The consequence is, not only the misery arising from the uncertainty, whether that, which they have been enjoying with happiness, and upon which their families are to subsist, is their property; but it is an invitation to all, who may fancy they have an interest in it, to make an attack. There cannot be much doubt therefore, which is the best rule: but the course that now prevails has been established so long, that I have not authority to alter it.

But this case does not fall within that rule: for, attending to the particular, and giving the Plaintiff credit for a persuasion, that he could sell according to the particular, that contract authorized the purchaser to say he was to go into the Master's office to contend nothing but the point, whether that abstract gave a good title; and if upon such a particular, instead of going to the decision of a simple question of Law upon the instruments appearing on the abstract, proof is to be made by the examination of old witnesses, under commissions, whether these rights of common exist, and are consistent with the instrument, though instead of the freehold the purchaser would have nothing but sheep-walks, the consequences would be most mischievous. Though on the other side there may be some hardship upon the person, who ought, before he enters into the contract, to know the state of his title, the effect would be the greatest injustice to the other, who cannot know any thing but from the inquiry before the Master. Of two innocent individuals the burthen of costs must fall upon the former, not the latter. Therefore, though there is no imputation upon the Plaintiff's conduct, my judgment is, that under the circumstances of this contract, and the Plaintiff's title, and attending to what is the rule of the Court as to costs, this bill must be dismissed with costs, to be paid by the Plaintiff.

1805.
Aug. 3, 10, 17, 21.

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Though a party is not permitted to execute a power for his own benefit, and the objection cannot be waived by a party, participating in the benefit, as against other interests, the Court will not act against the title upon a mere suspicion, that a transaction was of that nature, appearing fair both upon the instruments and the abstract; viz. a purchase under the execution of a power of appointment by a father, subject to estates for life in him and his wife, in favour of their son, all three joining, and receiving the money, the fair value; which is presumed to be received according to their interests in the estate, and the purchaser not bound to see to the application. Power of appointment by deed, to be signed and sealed in the presence of witnesses. The attestation applying only to sealing and delivery, though the deed purported to be signed, sealed, and executed, it was presumed, that the signature was in the presence of the witnesses (1).

Mere suspicion upon opinions in the abstract, &c. will not support an objection by a purchaser. Power of sale not well executed by a partition.

The objection by a purchaser applying only to a small part of the estate, a specific performance decreed with compensation.

THE bill prayed the specific performance of an agreement for the sale of the estate of *High Cannons*, *Herts*, by the Plaintiff to the Defendant, for 14,175*l.*; which was resisted upon different objections to the title: the Plaintiff also insisting, that all objection was waived by the Defendant, having immediately after the sale attempted to re-sell the estate by auction, at which sale it was bought in, and thereby a future sale was prejudiced. By a decree, pronounced at the Rolls, a reference to the Master as to the title was directed. The Master's report was in favour of the title, except as to a small part, a little exceeding six acres: which part the report stated not to be material to the possession and enjoyment of the estate, and that 500*l.* would be a proper compensation in respect of it. Exceptions were taken by the Defendant to the report; as stating, that a good title could be made to all the estate, except the six acres; and, that the six acres were not material to the possession and enjoyment, and by the Plaintiff; as the report stated, that the Plaintiff could not make a good title to the six acres.

* The objections to the title as to the principal part of the estate stood upon the following instruments and circumstances.

By indentures dated the 8th of *July*, 1745, the Manor and estate of *Cannons* were settled to the use of *William Abney*, for life, without impeachment of waste, remainder to the use of *Catherine* his wife, for life, in the same manner: remainder to trustees to preserve contingent remainders: remainder to the use of all and every, or such one or more of the children of *William* and *Catherine Abney*, and in such parts and proportions, manner and form, and subject to such charge or charges for the benefit of any such child or children, and with or without power of revocation, as *William Abney* by any deed or deeds, writing or writings, to be by him signed and sealed in the presence of two or more witnesses, or by

[(1) See the note (1) to *Burrowes* v. *Lock*, *ante*, vol. ix. p. 471.]

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his last will and testament, attested by three or more credible witnesses, shall direct or appoint; and, until such direction or appointment, to the use of all and every the children, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, and the several and respective heirs of their bodies, with survivorship, if one or more die without issue; and for want of such issue, to the use of the heirs of the body of *Catherine*, remainder to the heirs and assigns of *William Abney*.

This deed contained a proviso, that it shall be lawful for *Abney* and his wife during their joint lives, and for the survivor, by any deed or deeds, writing or writings, to be by them or the survivor sealed and delivered in the presence of two or more credible witnesses, to revoke and make void all and every the uses and estates before limited, and to limit to two trustees; upon trust that [469] they shall with all convenient speed after creating such trust by direction of *Abney* and his wife, or the survivor, in writing, sell and convey the premises; and upon further trust, that the trustees shall with all convenient speed by direction of *Abney* and his wife, or the survivor, or the executors or administrators of the survivor, lay out the money to be raised by such sale in the purchase of freehold estates, and settle the same to the same uses, or such as shall be capable of taking effect, (except the power of revocation and trust to sell,) and until the purchase with consent, &c. to lay out the money upon real or government securities.

The deed contained another power for *Abney* and his wife, or the survivor, by any deed or deeds, writing or writings by them or the survivor, signed and sealed in the presence of two or more credible witnesses, to revoke or alter all or any of the said uses, before limited, of the premises or any part thereof, and by the same deed or deeds, &c. to any other, to declare any new or other uses of the same, or so much whereof such revocation or alteration shall be made, as they or the survivor shall think fit.

By indentures, dated the 3d of *March*, 1748, *Abney* and his wife under the powers limited to them revoked all the uses; and appointed all the premises to the same uses, except the last power to revoke the uses, and limit new uses.

By indentures, dated the 15th of *July*, 1771, reciting the above instruments, and that *William Abney* and his wife had *Robert* their eldest son, and five other children, it was declared, that in consideration of natural love and affection, which *William Abney* had for *Robert Abney*, his eldest son and heir apparent, and in performance of a

promise and agreement made by the said *William Abney* unto and with the said *Robert Abney*, and for other good causes and considerations, *William Abney* by force of all and every or any of the powers limited to him, did by the said deed by him signed, sealed and executed, in the presence of three credible witnesses, declare, direct, settle, limit, and appoint, all the said Manor of *Cannons*, &c. from the determination of the estates for life, limited to him and his wife and the survivor and subject thereto unto and to the use of *Robert Abney*, his heirs and assigns for ever. 1805. [illegible] v. [illegible] * 170

By indentures of lease and release, dated the 30th and 31st of *August* 1771, reciting the above deeds, and an agreement for a sale, it is witnessed, that in consideration of 8000*l* paid to *William Abney* and *Catherine* his wife, and *Robert Abney*, by *Robert Cotton Trefusis*, *William* and *Catherine Abney* did grant, bargain, sell, release, direct, limit, and appoint, and *Robert Abney* did grant, bargain, sell, release, ratify and confirm, unto *Trefusis* and his heirs, the Manor of *Cannons*, &c. to the use of *Trefusis*, his heirs and assigns; with covenant to levy a fine, which was levied accordingly.

The objection to the title as to the six acres arose in this way. *Honest Smith* by his will devised one moiety of his estates in the Counties of *Middlesex* and *Hertford*, to the use of *John Carter* and his wife, their heirs and assigns for ever, and the other moiety to the use of *Mary Randall Carter*, her heirs and assigns for ever. The latter moiety was in 1758, settled upon the marriage of *Mary Randall Carter* with *James Yalden*, to the use of *Yalden* and his wife successively for life without impeachment of waste, and afterwards of their children according to appointment, in default of appointment, equally, with cross-remainders: and in default of issue, to the use of *Yalden* and his wife, and the survivor, with power for *Yalden* and his wife, or the survivor, by any deed or writing, signed by them or the survivor of them, and attested by two or more witnesses, with consent of the trustees in writing, and attested, as aforesaid, to revoke and make void all the uses and estates therein limited, and absolutely to sell the said moiety or any part thereof for the best price by one or more sales to any person willing to purchase the same, so as the money arising from such sale should be paid to the trustees, upon trust as soon as conveniently might be with the same money to purchase other freehold lands, tenements and hereditaments, of equal value with the moiety of the messuages, lands, and hereditaments, to be sold, and settle the same to the same uses as the said moiety of the said premises then stood, except the proviso for revocation [171]

1801. By indentures of lease and release, dated the 12th and 13th of *June*, 1755, in pursuance of a recited agreement for partition, and in consideration of 602*l* paid to the trustees in *Yalden's* marriage settlement by *Carter* and his wife for equality of partition, *Carter* and his wife and *Yalden* and his wife conveyed to trustees, to the use, as to part of the premises divided, of *Carter* and his wife in fee, subject to their power of appointment, and, as to the other part to the same uses, as the marriage settlement of *Yalden*, with a covenant from the trustees to apply the 602*l* for the purposes of the settlement.

[illegible]

The objections, therefore, taken upon these instruments were, first that the appointment by *William Yalden* in favour of his son *Robert* appeared to have been made under a previous agreement between them, and, if the father derived any benefit from that agreement, which seemed probable, or even made a previous stipulation,

[472] that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution of the power.

The second objection was, that the power of sale, contained in the deed of 1753, did not authorize a partition.

A third objection was taken to the form of attestation of the execution of the deed of appointment of 1771 by *William Yalden*, as applying only to the sealing and delivery: the power requiring signing and sealing.

Mr. Richards, and *Mr. Leach*, for the Plaintiff. *Mr. Alexander*, *Mr.* [illegible], and *Mr. Thomson*, for the Defendant.—In support of the exception, taken by the Plaintiff, to the Master's report against his title to the six acres, the case of *Abel* v. *Heathcote* (*a*) was cited as a direct authority, that a power to sell includes a partition, and it was contended, that the partition in that case was authorized by the power to sell, not the power to exchange, and if it was by the latter, a power to sell, where the object is, as in this instance, to lay out the money in other land, would equally extend to a partition.

For the Defendant, it was argued, that this point is not decided by that case, which might have proceeded upon the power to exchange: and according to one of the reports (*b*) the language of the Court is less favourable to the opinion, that it was upon the power of sale, and it is

[473] more easy to consider a power to make a partition included in a power of exchange than in a power to sell.

Upon the exception as to the title to the principal part of the estate, the Plaintiff to repel any suspicion of fraud upon the son, relied on the fact, that the instruments of

(*a*) 4 *Bro. P.* [illegible] vol. (*b*) *Ante*, vol. ii. 98.

1771 were executed under the opinion of *M. Dunne* who on behalf of the purchaser *Dobson* advised, that *Bruen* and his wife should by lease and release, under their powers, appoint to trustees and their heirs, to the use of *Bruen* and his wife for their lives and the life of the survivor, and, after their deaths, to the use of their eldest son, his heirs, &c., and afterwards, that the eldest son should by lease and release, and fine ... convey to the purchaser and his heirs. 1803. [illegible]

The Lord CHANCELLOR.—According to the reason, appearing, to be given by the Lords Commissioners, one power of sale will include every other power, of exchange, partition, &c. It is clear, the converse would not hold: a power to make partition would not include a power to sell, and, I think, a power of exchanging, would not. That case does not come to much authority, for the Lords Commissioners declined to decide the question, recommending another argument, and The Lord *Chancellor* puts it, not upon the power to sell, but upon the power to exchange, or, speaking more accurately, the power to convey in exchange for or in lieu of other lands. But the question before me is, not, whether a power to exchange includes partition; but, whether a power to sell authorizes partition. If that question has not been yet decided, it will be proper to decide it according to law. I will look at that case.

Power of exchange does not include a power of sale

The Lord CHANCELLOR.—These exceptions involve three questions: one, the effect of the transaction under the power, given by the title deed, relating to the six acres: the other, the effect of a transaction, stated to be the execution of a power, contained in a deed, which is part of the muniments, relating to the greater part of the estate. Another question, less considerable, is whether, supposing the power well executed, the circumstance of the attestation forms an objection to the title. 474

As to the six acres, the title is represented as depending altogether upon the effect of an instrument, executed in 1755. The state of the title was not discussed, either, as it may be affected by any thing that passed subsequent to that year, or with reference to the general law of partition: but it was put simply upon the point, whether the power, contained in the deed of 1753, is well executed by the transaction that took place in 1755. That transaction is, not only a partition, but also in a sense a sale of part of the premises, for that sum of 602*l.* paid to the trustees in *Yalden*'s marriage settlement, to be laid out in the purchase of other lands, to be settled to the same

1805. M'QUEEN v. FARQUHAR.

[illegible] But there is nothing, distinguishing any particular part of the estate, as being that, in respect of which that sum of 602*l* was paid. So the transaction is as to each, and every acre a partition, and a sale, in a strict sense; and also as to each and every acre it is neither a partition nor a sale. I am not at liberty to inquire, whether this is a good equitable title. The question before the Master was, whether there was a good legal title as to these [illegible] acres. It is insisted, that the receipt of the entirety in part of the estate in lieu of an undivided moiety in the whole, and the receipt of that sum of 602*l*. for owelty of partition, amount to, not only an equitable, but a legal, execution of the power: that the transaction in 1753 was

[475] not a revocation of the uses of 1753 to the intent to receive money, and lay it out in other lands, to be settled to the same uses, but a revocation under an execution of the power, to the intent to convey the entirety in certain acres, and to receive from the same persons what would make the entirety in other acres; and that the effect was a good revocation of the existing uses, and a limitation of new uses, to enure upon and attach to the seisin of the releasees in the settlement of 1753; for that must be the effect of a good legal execution. That is contended on the ground, that the effect of both operations is precisely the same; and that there is no doubt, this moiety might have been sold, and the money employed in purchasing the entirety. It might, or might not: but the real question is, whether by the law, attaching upon the doctrine of uses, this new use is well limited.

Under a power to alter uses the new use will not arise except in the very circumstances prescribed by the contract.

I conceive, that, where there is a conveyance by lease and release to uses, with a power to alter the uses by an instrument, the terms and limitations of which are prescribed by the general law, the new use will not arise except under the very circumstances in which it is contracted that it shall arise. In the ordinary settlements of great estates, powers of sale, partition, exchange, &c. are inserted. As to the last special caution is used, if there is not a previous power of revocation, to declare, at what time the uses shall be revoked, and the seisin shall attach upon the new use; and no cesser or determination of the old uses or creation of new uses arise, except in the very circumstances described. This is a power of revocation; but to the intent to do some other act, and that intent, as prescribed by the instrument, must accompany the revocation, in order to make the revocation essential. It is clear, this was not disturbed by decision, though there

[476] were floating opinions, until the case of *Abel* v. *Heathcote*. (a) I doubt, whether the language I hear and have

(a) 4 *Bro. C. C.* 278. *Ante*, vol. ii. 98.

read, that a power of exchange is well executed by a partition, is authorized by any thing in that decision. Exchange and partition are very different. According to *Shepherd's Touchstone* and other old books you cannot exchange, until there has been a partition. There is infinite difficulty in saying, a partition under the execution of a power by a tenant for life with those, who have the inheritance in the other moiety, could be called an exchange. I am not surprised, that the Lords Commissioners in *Abel* v. *Heathcote* had considerable doubt upon it; and I should rather have said upon that case, that a partition was a conveyance for "such other equivalent interest" in lands, according to the expression of the deed, as to the trustees should seem proper, than put it upon the ground, that a power of exchanging authorized an exchange by partition. Certainly receiving the entirety instead of a moiety does appear like receiving "such other equivalent interest" in lands &c.

1805.
M'QUEEN v. FARQUHAR.
Distinction between exchange and partition.
Whether a power to exchange can be executed by partition, Q.?

But I am not called upon to decide, whether a power of exchange can be well executed by partition: a point, which, if it had been decided by that case, I would not disturb. This case was discussed in short opinions, given by Sir *Dudley Ryder* and *Mr. Filmer*, and a very elaborate one by *Mr. Booth*. The case was laid before them upon the will of Sir *John Jackson*. *George Jackson* was tenant for life, having an express power with consent to revoke the uses, and to sell or exchange any part of the land; so as the money should be invested, and the land received in exchange should be settled to the same uses. The tenant for life had an estate in fee of his own. The object, which he meditated, was one very frequent in considerable families; that he should sell or exchange the estate he had in fee simple for an estate in settlement, buying the latter for himself under the execution of the power, vested in him. That tends to open the question, how far this Court would endure a tenant for life of a settled estate, executing such a power, with the object to bring into settlement an estate of his own, and to put out of settlement an estate, which was in settlement. *Mr. Booth's* opinion expresses in much better terms than I can many of my own notions on the subject. [477]

This case is much stronger; and, having met with no case, in which a power of sale in these words has been considered well executed by a mere partition, it seems to me more conformable to principle to say, that is not a due execution of the power, than that it is so. Therefore, without infringing upon *Abel* v. *Heathcote*, I must hold, that this title to these six acres is not unexceptionably good in Law, whatever it may be in Equity.

Next, as to the attestation, required by the power of

1805. revocation as to the larger part of the estate. That objection was not much insisted on. The power itself, in the deed of 1747, the marriage settlement of *Abney* and his wife, was executed in 1771, by a deed, purporting, that *William Abney* did by that deed, by him signed, sealed and executed, in the presence of three credible witnesses, declare, &c. The fact in all probability is, that the person who prepared the attestation, indorsed the ordinary words, not attending to the circumstance, that the party was doing the act by this deed, purporting to be signed sealed and executed, in the presence of the witnesses. Upon the question, whether after execution it ought to [478] be taken, that he did sign in the presence of the witnesses, attesting the sealing and delivery, there would be a miscarriage in a Judge, directing a jury, if that fact was found, not to presume, that the deed was signed in the presence of the same witnesses, as it professed to be. That attestation therefore is good.

MOSELEY v. FARQUHAR

Another question, of immense importance, is, whether the power given by the settlement of 1747, is ill executed, upon the ground of such suspicion as may arise upon the circumstances, appearing on the face of the instrument, or those disclosed in the abstract, coupled with the probability, that the same circumstances, in the body of the abstract, not upon the face of the instrument, were disclosed to the persons, through whom the title had gone. I mention that, as, if the intermediate persons had not notice, this person, though he had notice, would have the benefit of that. Upon the face of the instrument the power is given to a person who is tenant for life, with remainder to his wife for life, to limit the reversion after their lives to such one or more of the children as he should think proper, and upon the face of the instruments it appears, he did by a deed, dated the 15th of *July*, 1771, reciting the indentures of 1747, and a fine levied, in consideration of natural love and affection, and in performance of a promise and agreement made by him unto and with his son, and for other good causes and considerations, appoint the reversion to his eldest son, his heirs and assigns for ever. By other deeds, dated the 30th and 31st of *August*, in pursuance of a contract for the sale of the estate, in consideration of 8000*l.* stated to be paid to the husband, wife, and son, they convey to the use of *Ingfusis*, with a covenant to levy a fine, and a fine was levied.

A person affected by notice, has the benefit of the want of notice by intermediate parties. (1)

[479] It is clear, if nothing appeared, but, that the father and mother, seised for their lives, with such a power, appointed in favour of their son in fee, and afterwards by a trans-

(1) *Bumpus* v. *Platner*, 1 Johns Ch. Rep. 213. *Curtis* v. *Jones' Ex.* 6 Munf

action, separate from, or connected with, the transaction of the power, supposing, their intention had been to give the entire benefit of the reversion to their eldest son, after such appointment, either by previous or subsequent contract, to which the son was a party, they had sold the estate for 8000*l.* the full value, and upon the face of the instruments that money appeared to have been paid to the three, in Law and Equity that would have been a payment to them according to the interests they had in the estate; and the purchaser would be safe, as the money got home to the three persons entitled, and how they disposed of it afterwards, as to their respective interests was not of any importance to him. 1805. M'QUEEN v. FARQUHAR.

But it is stated, that if a person executes a power for his own benefit, there is an objection that cannot be waived by a person participating in the benefit arising from that transaction; and, therefore, the circumstance that the eldest son waives the objection, is not sufficient, if the younger children are discontented; for they are entitled to the benefit of the settlement, unless the interest, vested in them, has been dislodged, and devested. It is truly said, this Court will not permit a party to execute a power for his own benefit. In Lord *Sandwich*'s case a father, having a power of appointment, and thinking, one of his children was in a consumption, appointed in favour of that child; and the Court was of opinion, that the purpose was to take the chance of getting the money as administrator of that child. To bring this case within that, it is said, if there is any ground for suspicion, that the execution of the power was for the benefit of the party executing, the Court must act upon it, as a judicial suspicion. I am extremely apprehensive, I should make great havoc in many considerable titles by adopting that principle: for upon the cases, to which I allude, it is extremely familiar, that a person, having a settled estate and an unsettled estate, executes his power, in order to acquire the fee of the former, giving to the uses of the settlement the fee of the unsettled estate; and the Court would go a great way, and would make great havoc among titles, by holding, that, afterwards, at a considerable distance of time, or immediately, (for there must be regard to the intervening circumstances,) as such a transaction took place between parties, who might take improper advantages in their dealings upon the estate, they must prove that they did not. [480]

If there is not sufficient upon the face of the instruments to shake the title, what is there upon the face of the abstract, supposing all the purchasers had notice, beyond what appears upon the face of the instruments, to authorize this Court to say, this power is not well exe-

1805. cuted in Law, or, if it is, that it is not well executed in Equity? The few circumstances are these *Adams*, the father, entered into a contract with *Trefusis* for the sale of the estate to him, previous certainly to the execution of these instruments, which shows an inconsistency in the recital, stating the contract to be with the father and son, unless there was a subsequent contract. He states in a case for the opinion of *Mr. Dunn*, that he had entered into a contract. The opinion was, that a title could not be made, unless an appointment was executed to the son, of age. The father does make that appointment. It does not appear that the estate sold for less than its value; that the son got less than the value of his reversionary interest. But the estate becoming his absolutely, by the appointment, he, by an instrument, affected by nothing

[481] but the contents of it, as the owner of the reversion accedes to the purchase, conveys with his father and mother, in consideration of 8,000*l*., and the parties, taking the conveyance, pay the money to the father, the mother and the son, to be dealt with according to their respective interests: that is, according to their rights in the land, and though the contract with *Trefusis* was only to substitute money for the estate, there was nothing to show, that the son was not to receive a due proportion of the money, when the contract was afterwards executed by the deed, in which he joins, and with his father and mother receives all the money. Upon the question, therefore, whether those possibilities and probabilities are sufficiently evidenced by any thing, to show, that this is not a good title, my opinion is, that it is a good title. I say nothing as to what is to be done upon that: and that it is such a title as the Court will according to its present course compel a purchaser to take. I that argued

For the Plaintiff, it was then contended, that the title being declared a good title, as a necessary consequence the purchaser must take it with costs, (*b*) that in *Shepland* v. *Smith* ( ) there was a considerable legal opinion against the title, and it appeared by this Defendant's answer, that he resisted merely because he did not like the purchase.

For the Defendant, it was insisted, that this was not such

(*a*) See *Lanesborough* v. *Bliss*, *ante*, 458.
(*b*) See *Lanesborough* v. *Bliss*, *ante*, 458.
(*c*) 1 *Bro. C. C.* 75. *Cooper* v. *Denne*, *ante* vol. i. 565. 1 *Bro. C. C.* 80. *Sheffield* v. *Lord Mulgrave*, *ante*, vol. ii. 526. *Rouke* v. *Kidd*, *ante* vol. v. 647. See *Lanesborough* v. *Bliss*, *ante*, 458.

a title as a purchaser was bound to take; that there is no rule to give costs with a decree for specific performance: *and in Cox v. *Chamberlain*, (*a*) the purchaser having resisted, under the advice of Counsel, Lord *Alvanley* did not give costs. 1805. M'Queen v. Farquhar [* 482]

The Lord CHANCELLOR.—I am firmly of opinion, that the title to the legal estate, attending to all that could be known from the abstract, is a good title, and such as a purchaser must accept; for I should very reluctantly lay down, that notice from opinions on an abstract, or any thing that appears upon a deed, that there may by possibility be reason to suspect, what I cannot know, and may not be true, that the title is bad, is such a notice as would affect a purchaser. The vendors were right to abstain from making applications to the younger children. It was not the duty of the vendors to take steps to bring the title into question. Aug. 21

As to the costs, if the question was no more than a question of title, I should act hardly by the Defendant by not giving the title the credit of making him pay the costs; for it would help the title. But I shall give no costs; the Plaintiff having contended, on a grave ground, but unsuccessfully upon the evidence, that the acts done in putting up the estate to sale again amounted to an acceptance of the title, at least as to all except the six

The exceptions were disposed of accordingly; and the decree made, for a specific performance of the contract without costs.

(*a*) Ib., vol

1807.

May 9.

JUDD v. WYATT.

Trust by will as to a moiety of the share of the testator's married daughter *A* for her separate use to the end, that it may not be subject to the control, &c. of *B* her present husband, or any other husband; remainder to her husband *B.* for life; remainder for all the children of *A*; and in case there shall not be any children of *A* or all shall die before twenty-one, for the survivor of *B* and *A* his wife, his or her executors, &c., and as to a moiety of each of the shares of each of his two unmarried daughters, "upon the like "trusts and under the like "restrictions" as described concerning the share of *A.* "so and in "such manner "as that the "same may be "secured for "the benefit "of his said "daughters "and their "children, and not be subject or liable to the control of any husband they may happen "to marry." One of the unmarried daughters having married, and died without issue, her husband, surviving, is not entitled to any interest in the moiety, the subject of the trust created by the will.

WILLIAM MADOX, by his will, appointing his son, and *William Hewlett*, and *William Carr*, his executors; and giving them legacies, gave, devised, and bequeathed, all the rest, residue, and remainder, of his freehold, copyhold, leasehold, and personal estates, unto and to the use of his son *William Madox*, and his daughters *Hanah Madox*, *Ann*, the wife of *Edward Wyatt*, and *Molsey Madox*, equally to be divided between or among them, share and share alike, as tenants in common and not as joint-tenants, and their several and respective heirs, executors, administrators, and assigns for ever: and he directed, that, as soon as conveniently might be after his decease, the moiety or half part of the portion or share, thereby provided or intended for his said daughter *Ann Wyatt*, should be conveyed, settled, and assured, unto and in the names of his executors, their heirs, executors, &c. upon the trusts after declared: viz upon trust, that the trustees, &c. do from time to time during the natural life of his said daughter *Ann Wyatt* pay and dispose of the clear yearly rents, issues, and profits, of such moiety unto such persons, and in such parts, shares, and proportions, and for such intents and purposes as his said daughter *Ann Wyatt* shall from time * to time notwithstanding her coverture by any note of writing made under her hand direct or appoint: and in default of such direction or appointment to pay the same into the proper hands of his said daughter *Ann Wyatt*, or otherwise permit her to receive and take the same to and for her own sole and separate use and benefit, to the end and intent that the same rents and profits may not be subject or liable to the control, order, direction, debts, or engagements, of the said *Edward Wyatt*, her present husband, or any other husband she may happen to marry, but may be absolutely at her own disposal, and that the receipts of his said daughter *Ann Wyatt*, or the persons, to whom she shall appoint the rents, &c. to be paid, shall be sufficient discharges: and from and after the decease of his said daughter *Ann Wyatt*, then, and in case she shall happen to die in the lifetime of her husband the said *Edward Wyatt*, upon trust to permit and suffer, or fully authorize and empower, the said *Edward Wyatt* and his assigns to have, receive, and take, the same rents, issues, and profits, for and during the term of his natural life, to and for his and their own

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use and benefit; and from and after the several deceases of the said *Edward Wyatt* and *Ann* his wife, upon trust to stand possessed of the principal of such moiety, and of the stocks, funds, and securities, in which the same shall be then invested, in trust for all and every the child and children, both sons and daughters, of his said daughter *Ann Wyatt*, already born, or hereafter to be born, equally to be divided between or among such children, if more than one, share and share alike, as tenants in common and not as joint-tenants: the shares of each of such children to be paid, assigned, transferred, and conveyed, to them respectively on their attaining their respective ages of twenty-one years; if that shall happen after the decease of the survivor of them the said *Edward Wyatt* and *Ann* his wife: but if they shall attain such age [485] in the life-time of the said *Edward Wyatt* and *Ann* his wife, then within three months after their death, (with directions for maintenance and survivorship among the children,) and in case there shall not be any children of the said *Ann Wyatt*, or being such all of them shall happen to die before attaining the age of twenty-one years, then upon trust, that the trustees, &c. shall from and after such failure of children as aforesaid, assign, &c. all such moiety, &c. unto the survivor of them the said *Edward Wyatt* and *Ann* his wife, his or her executors, administrators, and assigns for ever

The testator then expressed himself as follows. "And "I do hereby direct that as soon as conveniently may be "after my decease one moiety or half part of each of the "portions or shares hereby provided or intended for "my said daughters *Hanah Malo e* and *Molsey Malo* "shall be conveyed settled and assured unto and in the "names of the said *William Hewlett* and *William Car*, "their heirs, executors, administrators, and assigns, upon "the like trusts and under the like restrictions as the "moiety or half part of the portion hereby intended for "my said daughter *Ann Wyatt* is herein-before directed "to be settled and assured so and in such manner as that "the same may be secured for the benefit of my said "daughters and their children, and not to be subject or "liable to the control of any husbands they may happen "to marry, and I do hereby direct that in each of such "settlements there shall be inserted all usual and customary provisoes, clauses, and agreements."

The testator died in 1790, leaving his son and three daughters surviving. *William Malo e* the son by his will [486] made a disposition exactly similar to that in his father's will in favour of his three sisters; directing settlements of a moiety of *Ann Wyatt's* share to her separate use, and after her decease for her husband and children, and of a

1805.

JUDD v. WYATT.

moiety of the share of each of his other sisters respectively, upon the like trusts, &c. in the very terms of his father's will. *William Madox*, the son, died in 1792, unmarried, and in 1799 *Molsey Madox* died unmarried. In 1800 *Hanah Madox* married *Thomas Judd*; and in 1802 she died, not leaving issue. The bill was filed by her husband against *Wyatt* and his wife, and the trustees *Hewlett* and *Carr*; praying a conveyance and surrender of one moiety of a fourth, and a moiety of a third of another fourth of the freehold and copyhold premises under the two wills.

The answer of *Wyatt* and his wife contended, that the Plaintiff was not entitled to any part of the estates, as neither of the wills direct any conveyance or settlement to be made of any part of the respective shares of *Hanah Madox*, or *Molsey Madox*, to or for the benefit of any husband either of them might marry in any event whatsoever; and it was not the intention of either testator, that any husband should be entitled to claim any interest in or benefit from such moieties of the shares so devised in trust for *Hanah Madox* and *Molsey Madox*: and those shares were so devised for the exclusive benefit of *Hanah Madox* and *Molsey Madox* and their children respectively independent of any husband.

The decree, pronounced at the Rolls on the 7th of *May*, 1804, declared the Plaintiff entitled according to the prayer of his bill. From that decree the Defendant *Edward Wyatt* appealed to The Lord *Chancellor*.

[487] (a) *Mr. Hollist*, and *Mr. Wetherell*, *for the Plaintiff*, *in support of the Decree*.—Upon the true construction of these wills, the Plaintiff is entitled to a life estate in that moiety of the portion, given to his wife *Hanah Madox*, by the respective wills of her father and brother, which was to be settled "upon *the like trusts*, and under the like restrictions," as the moiety of the portion, thereby intended for his daughter *Ann Wyatt*, was therein-before directed to be settled and assured. If the Court rested at that part of the clause, there could be no doubt as to the intention; and the remaining part of the clause which is apparently contradictory to the first, may be rejected. The clause then would stand thus, that the moieties given to the two unmarried daughters, *Hanah* and *Molsey*, shall be subject to precisely the same trusts, as those, to which the moiety given to *Ann Wyatt* was subject; one of which was, to secure a life interest in it to her then husband *Edward Wyatt*, in the event of his surviving her. The only reason the testator could have for particularly mentioning her husband, and expressly se-

(a) The arguments and judgment ex relatione.

curing his interest, was, that she was married at the time to him, and consequently the testator could have no motive for excluding the future husbands of the unmarried daughters. The limitation of the moiety given to *Ann Wyatt* being to *all* her children, it would extend to her children by a second marriage: whence an intention may be inferred, that a second husband she might marry should also take a life estate. 1805 JULL WYATT

Mr. Romilly, and Mr. Newbolt, for the Defendant, the Appellant.—Although the moiety of *Ann Wyatt* is limited to all her children, that limitation is not extended to her second or any other husband she might marry; such a presumption cannot arise from that limitation *to all* her children. The testator, contemplating the possibility of his daughter's marrying again, nevertheless excluded the husband by such second marriage from any interest in this moiety: which is a strong circumstance to show, that the testator in giving a life interest to her then husband *Edward Wyatt*, intended it as a personal mark of favour to him, and meant to put the unknown future husbands of his unmarried daughters upon the same footing as any such future husband of his daughter *Ann*. The subsequent words, directing, that the moiety given to the other daughters should be settled in the same manner, as that given to his daughter *Ann*, "so and in such "manner as that the same may be secured for the benefit "of my said daughters and their children, and not to be "subject or liable to the control of any husbands they "may happen to marry," are not contradictory to the preceding part of the clause, but explanatory of it, and operate so as to restrain the general words used before, by assimilating the trusts of the moiety given to the other daughters, to those of the moiety given to *Ann*, so far only as they were necessary to attain those two specified objects, and it is clear from the whole of the will, his intention was not to give their husbands any interest whatever, in one moiety of the fortune, the other appearing to him sufficient for the purposes of a settlement. [488]

The Lord CHANCELLOR.—I am told by the Counsel for the respondent, that if I look only to part of the clause in question, it will be impossible to doubt, but that the construction contended for by them, is the true construction to be put upon this will I am however by no means of that opinion, as I think, even in that view of the case, it would be difficult to say, what was the real intention of the testator; and my doubt in this case is, whether that must not at all events depend upon conjecture. [489]

It is quite clear, with respect to the testator's daughter *Ann*, that he meant to exclude all future husbands

1805. JUDD v. VYATT. she might marry, and I think, there is considerable reason for supposing, he meant to put the unknown future husbands of his unmarried daughters upon the same footing. At all events however, as this is a case, in which conjecture is opposed to conjecture, I do not think it is one, in which I am at liberty to supply the want of express words in a will.

The decree was reversed.

1803. July 26, 27, 28. 1805. Aug. 27. Ante, vol. vi. 159.

GASKELL v. HARMAN

The declaration of the decree, upon the principle, that the residuary property vested only as it was received and converted into money, was reversed. The Lord Chancellor's judgment being, that such an intention, though, if clearly expressed, it must notwithstanding the inconvenience be executed, was not the true construction upon the whole will; and is not to be collected, unless clearly expressed.

THE decree, as drawn up in consequence of the judgment pronounced at the Rolls in this cause,(a) declared the will of *John Strettell* established, &c., that *Alexander Forbes* was not entitled to a clear fifth part of * the residue of the estate and effects of the testator, unless such fifth part had been ascertained before the death of the said *Alexander Forbes*; and, that the residuary legatees of *Ann Forbes*, his sole legatee, are entitled to a proportionable share of such estate and effects only as had arisen at the time of the decease of *Alexander Forbes*; that the residuary legatees of *Strettell* are entitled to 25*l. per cent.* upon the legacies given to them, to be discharged by way of dividend. An account was directed of the personal estate of the testator *Strettell*, come to the hands of his four executors: what upon the account should appear to have come to their hands respectively to be answered by them or their representatives respectively.

The Master was directed to state, what sums of money were in the hands of *Strettell's* executors at the death of *Forbes*. An account was directed of the debts, &c., and an inquiry, which of the residuary legatees of *Strettell* are dead, and when they died respectively.

From this decree the Plaintiff appealed to The Lord *Chancellor*.

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Mr. Lloyd, Mr. Romilly, and Mr. Ainge, for the Plaintiff, Mr. Alexander, Mr. Stanley, and Mr. Toller, for the Defendants, in the same interest, in support of the Appeal.—This decree, adopting the very words of the will, leaves the question as doubtful as it was upon the will; declaring, that *Forbes* was not entitled to a fifth part of

(a) Reported *ante*, vol. vi. 159.

the residue, unless such fifth part *had been ascertained* before his death; and that his residuary legatees are entitled to a proportionable share of such estate and effects only *as had arisen* at the time of his decease. The ground of the judgment appears to be, that the property * was not to vest, except it was received. Consider the consequences of such a decision: the fraud, to which it leads: the temptation held out to executors to favour one legatee at the expense of the others. *The Master of the Rolls* supposed, that Lord *Thurlow* in *Hutcheon* v. *Mannington*, (a) determined upon the expression "*might* have received:" but the words of the will are in the present, not the past, tense: "*may* have received:" that is, "before he shall have received:" yet that was considered as leaving it so open to favour one party, that it could not be supported; that the Court would not leave it in the power of a trustee to vary the trust. That case was much considered, and the authority of it acknowledged by your Lordship in *Sitwell* v *Bernard*. (b) The difficulty, there stated by your Lordship, occurs in this instance. The principle laid down in *Hutcheon* v. *Mannington* is very wise; and was adopted for the sake of convenience, and to prevent the great expense of taking the account in this way, unless such a purpose is expressly declared.

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But it is not the true construction of this will to say, that the residue is to vest only, as it is received: a construction so inconvenient, from the consequence of taking an account, when each and every part was received, that the Court must be compelled by express words to adopt it. It is certainly very difficult to attribute a meaning to the words "or such of them as shall be then living" But if they are incapable of any sense, they must be rejected entirely, and the property must be considered as vested at the death. The words of the will, "shall be "made or arise," are strictly applicable, not to the receipt of the capital, but only to interest and produce of personal estate, which has no existence, until it accrues: and that application of those words is confirmed by the reason assigned, which is, not the state of his property, but the minority of his son, affording a prospect of accumulation. Upon the whole clause, the testator must have had some vague notion of property to be made from dividends and interest. But applying those words to the capital, property may be said to be made, if securities are put into the hands of a third person. If the word "ascertained," used in this decree, means more than that which is capable of being ascertained by an inventory, it goes further than the words of the will Property may

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(a) *Ante*, vol i. 366 (b) *Ante*, vol. vi. 520

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be very well ascertained, though not actually divided, even by an account. The judgment proceeds upon the ground of an intention, that the property should not be divided, but as it actually got into the hands of the executors; as every shilling should be received: an extraordinary construction. It is not contended, that it admits of immediate distribution: but that would not prevent the vesting. An intention to make five residuary legatees, giving the youngest a temptation to delay the vesting, is not to be supposed. It is clear from the conclusion of this will, that *Brickwood* was not to receive his proportion of the residuary estate at the same time as the other residuary legatees. The argument upon the case, that all these residuary legatees might have been dead a month after the testator, and before any thing was received, has not been answered. The constant course of the Court is to give a vested interest in a residue, if it can possibly be done; and *Booth* v. *Booth* (a) is a strong case for that. The last residuary clause in this will is a clear bequest to them as tenants in common, and must be considered as an explanation of the preceding part.

[493] Another great inconvenience from the construction, adopted by this decree, is, that it raises an interest in the executors to ascertain the property by bringing it to sale immediately, though part of it might consist of debts, part, of money, subject to accounts, the result of which was not known. Can it be represented, that, because property in the funds was not sold, or transferred into the names of the executors, it was property that had not arisen, or was not made, according to the words of this will? Suppose mortgages, or bonds, the executors actually receiving the interest: could they be said not to be a part of his property made or arisen, as they were not called in? Executors are not to call in money out upon security, and place it in the hands of their Bankers, merely for the purpose of ascertaining the amount of the fund. Part of his property consisted of Canal shares, at that time worth nothing, but which have since risen in value considerably: can that accidental alteration in value make this difference? A considerable part of his property consisted of out-standing debts in *America*. No event could be more vague and indefinite than the transmission of those debts. The intention to give so precarious a bounty is perfectly inconsistent with the expressions of kindness used with reference to these persons.

Mr. Mansfield, Mr. Piggott, Mr. Richards, and Mr. Winthrop, in support of the Decree.—Upon the whole of this decree it must be understood, though not so expressed

(a) *Ante*, vol. iv. 399.

as declaring, that the subject of this bequest was money at the death of each of these legatees in the hands of the executors. The expression in the decree, "sums of money," is not confined to actual money in their hands, but extends to money in the funds, &c. as opposed to mortgages or bonds. Upon any other construction no sense can be given to the words "made" and "arisen." There is no suggestion in the will, that these words apply only to interest and dividends. They refer to some conversion of property, then existing, which is clear from the preceding words "shall be received and accumulated." The two expressions, taken together, can apply to nothing but money to be received by the executors. So the word "surplus" means surplus of money before mentioned. The distinction of *Hutcheon* v. *Mannington*,(a) and *Stowell* v. *Bernard*,(b) from this case is, that this is, not a bequest to trustees for the benefit of third persons, the payment to depend upon the activity of the executors, but a bequest to these persons, four of whom are the executors, to get in the property; and it is obviously their interest to get it in as fast as they could. But, if one had a disposition to delay, he could not; for the other executors could get in the debts. What is there absurd in the purpose, that if the legatee shall live to receive money in *India*, he shall have it; but, if he shall die without having actually received it, another person shall take it? How can that express condition be controlled? The last residuary clause is not nugatory. It prevents an intestacy in any event; and the construction must be, that, if all had died before they would have been entitled under the former parts of the will, they would all have taken equally. The bounty of this testator is in a great measure personal, not looking to representatives. His will is very remarkable; providing a fund, to have effect at a very remote period, in favour of such of the legatees as should be then living: this is, when the funds shall fall into possession. Can such a loose residuary clause as this defeat that object, expressed with so much anxiety? In most cases, except doubtful debts, the whole personal estate may be ascertained immediately after the death of the party: property in the funds for instance, or upon mortgage, or other good security. The testator considered nothing as surplus, but what should be received beyond the sum of 45,000*l*., supposing all that secured. Whatever difficulty there may be in the purpose of this testator, it is not impracticable. In *Innes* v. *Mitchell*(a) equal difficulty occurred, but that was set right by the

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(a) Ante, vol. i. 366. (b) Ante, vol. v...
(a) p. 495. Ante, vol. xi. 461.

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Court. The attention being ascertained, such difficulties do not prevent the execution of it. Lord *Thurlow* in *Hutcheon* v. *Mannington* seems to admit, that if he could clearly collect, what time was meant, as when enough should have been received, not putting it simply upon the receipt, he would have given the legacy over; and it must be so: otherwise the Court says, a testator shall not do this; making a will for him. But it was impossible to say, when a legacy might be received in *England* from *India*; which is the ground, upon which that decision stands. Lord *Thurlow's doctrine* in the conclusion of that case applies to real estate. The late case of *Elton* v. *Elton* (b) bears strongly upon this.

Mr. Hart, in Reply.—There is no instance of a decision, that property shall vest, as every part is received. In *Dawson* v. *Killett*, (c) and that class of cases, the Court always says, the legacy vests at the same time as the estate for life; but, as it is not convenient to pay it, it shall not be paid until the more distant period. So, in this case, the share of the residue must be considered to have vested at the same time as the sum of 500*l.* unless it can be plainly shown, that some other period was in-

[496] tended. Suppose part of the property consisted of valuable securities, such as this Court would have continued, and part of cash; could the intention, if not expressed, be supposed, that the cash was to be vested, and not the securities? Could that circumstance vary the rights of the parties? Part of the testator's property consisted of shares of mines, and of the River *Lee* Company. Can those interests be considered as property, "not made and "arisen" within the sense of this will? No such intention as is contended for is expressed in this will: why then should not that ordinary rule prevail?

The Lord CHANCELLOR.—The decree leaves the will just as it was. The Court ought to have given some construction in the first instance to the word "ascertained." In that respect, therefore, the decree must be altered.

Upon the construction of this will I am far from saying, the additional residuary clause creates any doubt: for, if the will had directed, that provision should be actually made by the receipt of hard cash for the payment of these Annuities and legacies, to be ascertained in this sense, that 500*l.* should be given to each of the residuary legatees, and also giving the surplus to the residuary legatees then living, whenever ascertained, however absurd, if the intention was clear, it would be the duty of the executors to execute it, and the legal effect of the last

(b) *Ante*, vol. viii. 517. (c) 1 *Bro.* C. C. 119.

clause would be to give whatever residue there might be to all the residuary legatees: that is, to the representatives of all, if none of the residuary legatees were alive, when the residue, so constituted, was ascertained. Another mode of explaining it is, that he might have conceived, that, if the whole surplus should amount to but 300*l.* to each, that would not pass under a clause, giving the surplus, if it should amount to 300*l.*; and then that must pass by the residuary clause; and, if such a clause can have effect, the legal effect must be given to it.

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I admit the soundness of the proposition, appearing by the report to have been stated by *The Master of The Rolls*; that, if a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies, or the residue, unless they live to receive them in hard money, there is no rule against such intention, if clearly expressed. But that would open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention. In the case of *Hutcheon* v. *Mannington*, (a) I admit, I thought the meaning of those words was, what they shall have received; and I thought so even after the decision. The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him. If that intention can be supposed, it was natural in that case. The natural construction of that will was, if the legatee should die, before the property should be actually remitted to him. But Lord *Thurlow*, looking to those considerations, which he expressed with considerable anxiety, the more perhaps, as he perceived, that many of the Bar did not go along with him, thought himself at liberty to put a construction upon the will, that by possibility might be put upon it, supposing an intention, that there should be an inquiry as to each and every part, when it might be said, that it could have been received.

In the other cases the same principle has been acknowledged: not merely upon the inconvenience, but, as frequently the consequences would be very destructive; for, if you are to endeavour to find out words, giving the property over, when not actually received, in hard money, you must remember, that it is the duty of the executors in respect of that to call in the money: no discretion being left in them: such as the Court exercises, to judge, what are the proper securities to be continued: the executors being under the necessity of getting in the property by all remedies; which might endanger the loss of [198]

(a) *Ante*, vol. i. 366.

1805 the principal, for the benefit of those who were entitled to the immediate fruit. Considering also the variety of personal estate, the inquiry would be endless, as to each and every part, when by proper diligence it could be got in. The Court therefore has said, the best construction is generally to consider the interest vested and in hand, though, strictly, not collected for the purpose of enjoyment, as between the particular interests and the capital: and, if that is wise, the Court will not conjecture in favour of an intention against the general rule. It must however be distinctly understood, that, if the intention, contended for in this case, is clearly expressed, it must be carried into execution.

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That intention cannot be clearly collected from this will. The general idea of the testator was a conviction, that he was worth 45,000*l*., and, to secure that to his family, he held out this temptation to his executors and residuary legatees. His property was so dispersed, and therefore necessarily in some sense to be collected, that he could not find in it a security even for the 30,000*l*. for his son. He makes a provision as to the legacies and Annuities out of the payments to be made on account of his

[499] personal estate: but he also makes a further provision for them by mortgage or sale of real estate, and by directing timber to be cut on the estate devised to his son. This Court would have directed that sale and that fall of timber forthwith. Either a fund must have been provided for the satisfaction of all the legacies and Annuities, or a proportionate fund for each of them: but then as the Annuitants and legatees, except such legacies as were vested, died, the capital, set apart for them would accrue to the capital deficient for the other legacies and Annuities, before it would have fallen into residue of any species; so that in time there must have been a sufficient provision made for all the legacies and Annuities. After he had in this manner realized his conviction as to the sum of 45,000*l*. and provided for his wife and son, he makes this particular, whimsical, disposition as to the surplus, and the question is, what is the meaning of that clause, by which he declares his intention, that each of his residuary legatees shall have 500*l*. when it can be ascertained, that there is that sum for each of them. The construction that it depends upon actual receipt, is not the necessary construction. If he had property, capable of sale, to the amount of 50,000*l*. the construction contended for is, that all that property must be actually converted into money to answer the subsequent purposes of the will. Suppose, there were five good bonds, part of the property, and the obligor was gone to the country for the summer: are these residuary legatees to say, they will

not each take one, but will take the chance of surviving, until he returns, and pays them all. Such a construction the Court will not adopt, unless compelled to adopt it. 1805 ~ v. Hawes

The Lord CHANCELLOR.—The operation of the whole of this decree is, that the opinion of *The Master of the Rolls* was, that the representatives of *Forbes* were entitled only to a share of such sums of money as were in the hands of the executors of the testator at the death of *Forbes*. I always have thought it very difficult to put a satisfactory construction upon this will. It is impossible to deny, that the fund of 11,000*l*. 3 *per cent.* Consolidated Bank Annuities must be considered ascertained, having arisen, being collected, and within the meaning of every general word, by which the testator has described that fund, which is to be applicable to the general purposes of his will. He thought he had securities, of which he should die possessed, and which were to remain *in specie* for they were to be a fund for the Annuities. These securities therefore are in a sense property, collected, made, and arisen, immediately upon his death. By the term "securities" he meant even his real estate, though that is very inaccurate. This appears from the exception of his estate at *Gotrenk*, which he must have looked at as a security. In the direction as to the sum of 30,000*l*. for his son he considers that part of his property, whether 3 *per cent.* or securities properly, or even land under that description, which is made applicable to the Annuity for his wife, as part of his fortune, collected, made, and set apart, and which was to be estimated at 16,000*l*. He then proceeds to provide the means of raising the additional sum of 11,000*l*. It cannot be denied, that what is got in or set apart for the payment of that sum of 30,000*l*. if it became payable, though not converted into, and received as, money, is raised and got in within the meaning of this will. In case of the death of his wife the income of his son's fortune was to be an accumulating fund during his minority for the Annuities and other purposes of his will. He had given some legacies, which he recommends to be discharged at one payment, without waiting for the general distribution; clearly contemplating as to those, that the state of his fortune might be such as to make it questionable, whether with convenience they could be paid without waiting for that singular distribution, afterwards made for the general payment of his legacies and Annuities. So, he directs some subsequent legacies not to be paid in preference to other legacies before given; again contemplating the difficulty of payment

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1805. before the general distribution. In providing a fund for securing the payment of his annuities he uses the different words "invest, set apart, and apply" a sufficient part of his personal estate in the public funds or mortgages. It would be difficult to maintain according to the ordinary doctrine, that, if he had property on mortgage, or in the funds, the will according to the true construction would not have been answered by setting apart that property; not requiring, that there should be an actual conversion into money of all the property, in order to reconvert it into the shape it had at the time of his death, and which it was finally to have for the purpose of serving the trusts of the will. It would be singular to say, the executors should not be considered as having actually collected and got in the 11,000*l.* 3 *per cent.* Consolidated Bank Annuities, which in those events would have devolved upon them for the general purposes of the will; but, that they were by calling in mortgages and selling to provide the first fund for the annuities.

These observations seem small, but they lead to the consideration, what upon the whole the testator intended, attending to the convenience of the construction upon [502] the will, as holding that property in a state, in which it may be subservient to the trusts, as property collected and got in, or, that nothing was to be so considered, but what was in the language of the decree actually sums of money brought into the hands of the executors. From other parts of the will it is clear, the testator was looking to the obligation to make payments, and probably at stated times, and by instalments, and he thought, the state of his funds was such, that the legatees and annuitants could only have payment, as those instalments could be paid.

It is the arduous duty of the Court to declare the construction of that clause, in which, adverting to the probably long minority of his son, he expresses his intention, that his residuary legatees shall each of them receive 500*l.* at the least over and above their legacies, and therefore directing the disposition, that follows, "when that sum can "clearly be ascertained to them," for it is impossible to send a reference to the Master without declaring the meaning of those words. Upon the words, that follow, "if any further surplus shall be made or arise be it more "or less, the same to go and be equally divided among "my residuary legatees, or such of them as shall be then "living," and, more particularly, attending to the construction, that must be given to them by the construction that must be given to other words in this will of the same import, it is perfectly clear, the testator meant, that, if all his residuary legatees should not be living at some

period, to be ascertained in some way, future, and subsequent to his death, all of them should not take what he here calls the surplus: for, however inconvenient the construction, that the residue was not vested at the death of the testator, and would not vest, until actually collected by conversion into, and receipt of, money, considering the duties and powers of executors, yet I agree with *The Master of the Rolls*, that, if the testator has clearly expressed that purpose, the Court must find the means of executing it. The question therefore is, whether under those words in this passage, though upon a view of the state of his affairs, supposing it not complex, but the most simple, it should appear, that in a rational sense there would be 500*l.* to each of the residuary legatees, and a surplus beyond that, notwithstanding the inconvenience attaching to that doctrine, the Court would say, there should be no vested interest in the surplus, even in that simple state of circumstances, until all was converted into and received as, money; or, that when the property was in such circumstances, that it might be represented to be at home for all useful purposes, it should be considered ascertained within the meaning of the will. 1805. Gaskell v. Harman. [503

Suppose, for instance, the son's 30,000*l.* was secured, and also a fund for these annuities and legacies, and, beyond that, one mortgage, undeniably good, for 10,000*l.* and considered by the executors so clearly good, that though they had not set it apart for these charges, they all concurred in opinion, that it would not be for the benefit of the persons interested in the estate to change it. Or, put a still stronger case, that under the administration of this Court the Master had reported, that the security was good. Would it be said, that sum of 10,000*l.* was not ascertained, collected, made, and had not arisen according to the expressions in this will, but the operation was to be gone through of calling it in, and those only were to take it, who should sustain the character of residuary legatees living at the moment it was paid to the executors? My judgment is, that nothing but the strongest words should compel the Court to make such a construction.

The testator then takes up the case of the death of his son under the age of 21, which leads to the introduction of two bequests of the residue: one special, the other general. It might have happened, which would have produced a singular arrangement, that the property of the son might have been set apart, that during his minority a fund might have been collected for the annuities and legacies, and this fact might have been ascertained, that the residue beyond what was so collected would pay 500*l.* to each of the executors, and 2500*l.* more to the son, and [504

1805. leave a surplus: some of the residuary legatees might have died during the infancy of the son, and that sum of money, given to him, if he should attain the age of twenty-
GASKELL v. HARMAN. one, would have gone to different persons from those, who were to take the general surplus, if it was to be distributed before his age of twenty-one, for that is expressly confined to such of his residuary legatees as should be *then* living. In the subsequent disposition, dividing the property into nine parts, the word "money" must mean, not only "money," but also securities for money, and even real estate, for in the former part of the will the testator has considered real estate as securities, and as money for this purpose which also makes it very questionable, whether he could mean, that nothing was to be considered as got in, except what was converted into hard cash, and laid out again. It is clear upon the disposition of the remaining ninth part to such of his residuary legatees as shall be then living, whatever was the subject of the property disposed of to the son, and in the event of his death to be divided in this manner, whether money, or money's worth, the testator meant, that in so much as would in that event be undisposed of his residuary legatees should not take interests, as there named, as they would in the general residue. They might as

[505] general residuary legatees, have taken this ninth part for, if they had all died in the life of the son, and he had died in his infancy, that ninth part could not have gone to any of the residuary legatees, or to the survivor of them, by that clause: but it would be a ninth part of that fund, undisposed of, and would fall into the general residue, and then all five, as claiming the general residue, undisposed of, would have taken by their representatives for that is given to them generally, embracing all that fell in, and was not wanted for the general fund, and all, that should be undisposed of by the death of the son. Upon the remaining part of this clause it is also clear, that as to the property in such a state, that it was, or ought to be set apart for the legacies and annuities, the residuary legatees, whatever they were to take, were not to take *eodem modo*, but upon the death of the Annuitant those living at the time of the death were to take the fund.

Then comes the general residuary clause. If I was called upon to construe that without knowing what was the state of the property, it would be very difficult to say, what would be taken under this clause, constituting the bequest of the residue, for, if it was such, contrary to the expectation of the testator, as it might be, that a fund might have been set apart for the 30,000*l.* the legacies and Annuities, as, if his wife had died in his life, and there was a great clear fund, of bonds, notes, and securi-

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ties, sperate and desperate, the residuary legatees must have taken all, that was given before, as it was given: but as to the bulk of the property, which it was not necessary to set apart, under the residuary clause the interest would have vested immediately, though not in so much of the fund as must have been set apart to pay the annuities and the 50,000*l.*; as it would depend upon each surviving the son and the Annuitants: but all beyond what was necessary for those particular purposes and trusts is well given by the residuary clause. [506

The question therefore results upon the actual state of the property at the death, and the dealing with it afterwards. If the true meaning is, that nothing is to be considered as the testator's estate, collected, ascertained, made, and got in, within those general expressions in the will, except sums of money actually received, and I am to construe the first declaration of the decree by the subsequent inquiry, what sums of money were received, it follows, that, if the executors had set apart the 11,000*l.* 3 *per cent.* Consolidated Bank Annuities, and mortgages, under the term securities, (real estate even being considered as a security by this testator in the exception of his estate at *Gotwick*,) is not to be converted, but to be kept *in specie* for the purposes of the will, that would not do. But it is very difficult upon the whole will to say, that property, preserved at the death of the testator for the purposes of the will, was not within the meaning collected and ascertained, made and got in: and the question as to the vesting is to be decided differently, according to the actual state of the property, as to those particular parts of the property, which are to be set apart for particular uses, and what may or may not be eventually residue.

I desire not to be understood as determining this case upon ambiguous expressions. I agree with *The Master of the Rolls*, and I mean to put it all upon what I see he stated in *Innes* v. *Mitchell*, (a) and in this case, that it is in the power of a testator not to give any thing, until it is converted into money, and put into a shape to be divided as such. A disposition of that sort is not to be wished. [507 Whatever may be the difficulty of construing the expression in *Hutcheon* v. *Mannington*, (a) whenever a testator directs his executors to mortgage, sell, or convert his estate into money, and divide it among other persons, this principle is clear, that no fraudulent or unnecessary dilatory dealing by trustees shall affect third persons. The duty of the Court would require them to decree as a fact that loose expression "what they might have received," or they cannot say, they have not acted with all dili-

(a) *Ante*, vol. vi. 461.

(a) p. 507. *Ante*, vol. i. 366.

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gence, or permit a race between the lives of the different legatees; some of whom they might favour more than others, their wishes directing their conduct. The Court must hold a very strong hand upon such a case, which makes it wise to hold, that, unless driven to it by the state of the property and the expressions of the will, the Court would not willingly collect that meaning

To have this decree perfect, it seems impossible that it can stand exactly as it is If the judgment of the Court was, that *Forbes* was entitled to nothing except sums of money actually received at the time of his death, the decree ought to declare, that by particular expressions the testator meant so, and ought to direct the account according to that declaration. But it is premature to make any declaration, and, if any should be made, it must apply, not merely to the present state of the property and events, but also to what may be the effect of future events even upon the present state of the property. for suppose a collection of the property made for the son, not to the full extent of the testator's intention in his favour: if the son died during his minority, and none of these residuary legatees were living, as the ninth part would not be taken [508] under the particular bequest of it, it must be taken under the general residuary clause, and then *Forbes's* representatives would take equally with the rest But, further, it is very difficult to make out, that many parts of this property ought not to be considered as part of the testator's property within the meaning of the will, even as to the special residue, collected and got, as, *3 per cents* mortgages, real estates, for the purposes of this will considered securities, and, securities of different sorts, of a given value All these facts ought to be known.

Therefore let so much of this decree as contains these declarations be reversed, retaining so much as directs the inquiry as to the sums of money, and direct an inquiry as to the state of the property at the death of the testator, of what particulars it consisted, and in what manner it has been paid, applied, disposed of, and reserved, and for what purposes, from time to time since the death of the testator, and reserve, not only the consideration, to what species of property this declaration should be applied, but all further directions upon the will.

It is obvious, that, if my opinion was, that nothing could be considered as collected and got in but money actually created by the conversion of property, I ought not to make that variation: but it may turn out upon this inquiry, that parts of the property were as capable of being considered collected and got in, as money; and then it is premature to say, how much is property, in which *Forbes* was interested at his death.

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GORDON v. SIMPKINSON.

A bill to establish a customary payment in lieu of tithes does not lie upon a simple demand of tithes, without suit.

To a bill to establish a customary payment in lieu of tithes the ordinary must be a party.

A general demurrer holds; where the Plaintiff, entitled only to discovery, prays relief also.

THE bill was filed by an occupier of premises in *London*, stating, that the Defendant, entitled to tithes, some time ago demanded tithes from the Plaintiff at the rate of 2s. 9d. in the pound, according to the Statute of *Henry* VIII. (a) but not, that any suit had been instituted; and suggesting, that there was a customary payment in lieu of tithes, but not specifying any certain payment, prayed both discovery and relief.

To this bill the Defendant put in a demurrer.

Mr. Richards, in support of the Demurrer, took two objections: first, that the bill ought to state, what certain payments the Plaintiff insists upon. (b)

2dly, Upon the case of *The Earl of Coventry* v. *Burslem*; (c) deciding, that a bill to establish a customary payment in lieu of tithes in kind will not lie, unless the Rector, or Vicar, has instituted proceedings at Law, in Equity, or in the Ecclesiastical Court; considering such a bill merely in the nature of a cross-bill against the demand of tithes.

Mr. Romilly, for the Plaintiff, observed, upon the first objection, that the Defendant by the demurrer admits, that there is a certain payment, which he knows.

As to the second point, if the payment is disputed, a bill must be filed to establish it; and in the case cited the bill was permitted to stand as a bill to perpetuate testimony. [510]

Aug.

The Lord CHANCELLOR.—The bill in this cause is filed, not to perpetuate testimony, nor for discovery merely, but both for discovery and relief. The Defendant, a clergyman, entitled to tithes in *London*, claims, but not by suit, or demand enforced in any way, insisting without suit or action, that he is entitled to 2s. 9d. in the pound. The Plaintiff does not state, that he knows, there is a less accustomed payment, or, that he is ignorant upon the subject, and has a right to a discovery merely, what that payment is: but he prays both discovery and relief. He is not entitled to discovery, unless he is entitled to relief, according to the present course. (a)

(a) Stat. 37 *Hen.* 8. c. 12.

(b) *The Warden and Minor Canons of St. Paul's* v. *Morris*, *ante*, vol. ix. 155.

(c) 2 *Anstr.* 567, n. 4 *Gwill. Tith.* 1596.

(a) p. 510. *Baker* v. *Mellish*, *ante*, vol. x. 544. and see the note (a)

1805. Corton v. Simpkinson.

This case is analogous to the cases in the Court of *Exchequer*; deciding, that a person shall not file a bill to establish a *modus*, unless he has been actually disturbed. That point was very fully considered in *Lord Coventry* v. *Burslem*: which goes the full length of this case, this bill charging that some time ago the Defendant demanded 2s. 9d. in the pound. I have a considerable recollection of that case, and conversations upon it between the Barons of the Court of *Exchequer* and The Lord *Chancellor*. There was also a party, who must be a party here, before any relief can be given: viz. the Ordinary. Upon that authority the bill for discovery and relief cannot be supported.

Therefore allow the demurrer: but, following that case, if the Plaintiff chooses to amend the bill, I will permit him, paying the expense of it.

[511]

Ex parte NOWLAN.

1804 *July* 18. 1805 *March* 13 *Aug.* 27

Bankrupt committed by the Commissioners for not giving a satisfactory account. If the commitment is legal, no discretion upon *habeas corpus* to discharge him upon circumstances, that further examination can be of no use to the creditors.

As to the validity of the commitment, to the extent of compelling the discovery of a felony, Query.

THE Bankrupt, having been in custody several years, under a commitment by the Commissioners for not giving satisfactory answers to the questions put to him upon his examination, (a) was brought into Court under a writ of *habeas corpus*. Upon a former application to the Commissioners he stated, that he had in 1796 discovered, that the account he had originally given, two years before, and for which he was committed, that he lost his pocket-book, containing the bank-notes, which were the object of the inquiry, by the overturning of the mail coach upon his journey to *Ireland*, was not true; the fact being, that his wife, as she had since acknowledged to him, took that pocket-book out of his coat pocket, while he was in a state of intoxication, the night before he quitted *London*; leaving two other pocket-books in the pocket; so that he did not miss that, which was taken, until the accident had happened to the coach. Part of the bank-notes, to a considerable amount, had been traced, and recovered. The Commissioners remanded the Bankrupt, being dissatisfied with this account.

Under these circumstances a motion was made, that the Bankrupt should be discharged.

Mr. Cullen, in support of the Motion.—The Court of King's Bench upon the application to them went upon the

(a) See *Ex parte Nowlan*, 6 *Term Rep.* 118. *Taylor's case*, *ante*, vol. viii. 328

ground, that they did not believe *the Bankrupt's account 1805
This application presents a very different case. In the
last examination there is no contradiction whatsoever: Ex parte Nowlan.
the loss of the notes is put upon a different footing, and
the mistake admitted in the former account is explained. [*512]
The object of the power of the Commissioners is to compel a disclosure for the benefit of the creditors, not the punishment of the Bankrupt. If the creditors cannot derive benefit from any answer, that can be obtained, and the imprisonment, further protracted, can have no other effect than punishment he ought to be discharged, however dissatisfactory the account. This can operate only two ways: either imprisonment for life, or by compelling him to confess a capital felony; a situation, in which no subject should be placed. Whether, therefore, this story is true or false, being upon the face of it free from contradiction, and probable, he ought not to be remanded.

Mr. Romilly, for the Assignees.—The account, formerly given by this Bankrupt, was perfectly incredible, and the Court of King's Bench thought the commitment right. The account he now gives, upon information, received by him two years after he gave the former account, with which information he has [illegible] made application for eight years, is equally incredible.

The Lord CHANCELLOR said, he did not believe a word of this story, and ordered the Bankrupt to be remanded, desiring, that the Commissioners should be informed, it was his Lordship's wish, that they should call the Bankrupt and his wife before them, and examine them both.

The application of the Bankrupt to be discharged was [513]
renewed by petition (*a*). 1805 *Mar.* 1[illegible]

The Bankrupt's wife, upon her examination before the Commissioners, confirmed his last account. The Commissioners certified, that the Bankrupt declines to give any further account, that the examination of his wife appears unsatisfactory; that a considerable part of his property is still unaccounted for, and therefore he was remanded.

Mr. Cullen, in support of the Petition, insisted, that the Bankrupt was entitled to his discharge upon one of these grounds: either his account, which is directly confirmed by his wife, is true: or, if false, the result is imprisonment, until he confesses a capital felony; that the jurisdiction by commitment was given for the purpose of dis-

(*a*) Taylor's case, *ante*, vol. viii. 328. See page [illegible]

1805. covery only; not example; for which purpose a different mode is pointed out by the Legislature.

Ex parte NOWLAN. *Mr. Romilly, for the Assignees*, observed, that nothing had passed since, except, that the Bankrupt's wife had given an account, directly contrary to what she formerly swore; with which the Commissioners were so struck, that they read her former examination to her, and pointed out the contradiction, before they would permit her to answer.

The Lord CHANCELLOR.—When this case was formerly before me, I looked into all the authorities It is the case of a person, against whom a Commission of Bankruptcy has issued, brought before the Commissioners; [514] and being examined as to what had become of his property, he does not object to answer upon the ground, that the questions tend to call for answers which might implicate him in crime, and which therefore he is not bound to answer; but on the other hand he did state what he called an account. and the Commissioners, attending to what he said, thought it perfectly unsatisfactory; and therefore committed him. He was brought up by *habeas corpus*: and the case appeared to me to be reduced to this question, very unsatisfactory to a Judge: whether upon my view of the answers they were satisfactory, and the full persuasion of my mind was, that they were not satisfactory I was therefore obliged to remand him. One ground upon which the last commitment goes, as certified by the Commissioners, is, that a considerable part of the property still remains unaccounted for.

As to the ground of this application, that the questions tend to make him accuse himself, in the administration of this part of the justice of the country that case must be distinctly brought before the Court in another manner. The Bankrupt must before the Commissioners make his objection; so that the Court upon the application may distinctly see the nature of it, for a man may if he chooses waive his objection to answer any question, and may answer, and Bankrupts often do answer questions they are not bound to answer, and perhaps prudently; as in many instances the utmost severity of the law may be applied, and they may redeem themselves from the inclination to prosecute. As, therefore, it is in the power of the Bankrupt to answer or to demur, the course upon application to be discharged upon this ground is, that, being before the Commissioners, he must demur to the question, and then the state of the proceeding upon the return to the *habeas corpus* must be accurately brought [515] before the Court, and that course not being taken in this instance, it would be very dangerous to discharge the

Bankrupt If the answer was unsatisfactory before, it is admitted, it remains as much so now, the wife swearing directly contrary to what she swore before; and the circumstance being certified, that still property remains unaccounted for, how is this to be distinguished from *Perrott's* case? (a) As long as this is the state of the case, I fear, the Bankrupt cannot be discharged It I could discharge him from this commitment upon one ground, I must remand him for the other cause here stated If all the property had been obtained, that would have been a very proper ground. In that case probably he would have been discharged

1805. Ex parte [illegible]

The Attorney-General, and Mr. Cullen, in support of the Petition, in addition to the circumstances mentioned before, observed, that the estate could not derive any further benefit: the Assignees having sold their interest at a loss of 25 *per cent*. Aug. 27

The Lord CHANCELLOR.—There is peculiarity in this case. If the answers are unsatisfactory, though the examination can be of no use, yet, if the commitment is legal, upon the writ of *habeas corpus* I have no right to discharge the Bankrupt This state of things is singular: the Bankrupt during ten years gives very unsatisfactory answers, placing himself upon disclosures, that cannot leave any doubt, that he has been concealing his property: by accident a considerable part of the property is got together; and a recommitment has taken place when the examination can be of no use to the creditors. But the single question upon the writ of *habeas corpus* under that singular state of circumstances is, whether the commitment is legal: if it is, I have no discretion to discharge him. Whether Commissioners should, under such circumstances, forbear to commit, is a very different question There are two subjects for consideration. 1st, whether the Bankrupt stands in that situation, that according to law he can be called upon to disclose a crime: especially where it amounts to felony: viz the concealment of his effects: next, upon the writ of *habeas corpus* the Court is obliged to consider, whether upon the whole, that has passed in the course of the Bankruptcy, there is not reason to disbelieve him, when he says, he cannot make any further discovery without giving proof of a crime. The Commissioners do not appear to have taken it into consideration in that way, but have gone upon this ground, 516

(a) The King v. Perrott, 2 Burr 1122 1215

1805. *Ex parte* Nowlan. that he was bound to tell them, whether he had committed a capital felony, or not. If they are right in that, I cannot deliver him upon any such consideration as that further examination can be of no use to the creditors: for, if the commitment is legal, I am bound: but if they have no right to ask the question, they have no right to consider, whether the answers are satisfactory, or not.

No order was ma

[517]

Ex parte TWOGOOD.

Aug. 20. 22. 27.

Separate Commission of ... a greater amount, refused (1)

IN 1802, *Eldarton* and *Wilcox*, proprietors of a patent for a fire or steam-engine, took into partnership *James Dashwood* and *John Agnew*, partners in the Bank of *Strange, Dashwood, Agnew*, and *Prescot*, *London*, for two sixth parts each, and *Dashwood* and *Agnew* jointly and severally covenanted to pay to *Eldarton* for his own sole use the sum of 4000*l.* with interest from the 25th of *March*, the period, from which the partnership was to

and Co. stopped payment, *Eldarton* was indebted to them, for advances by them as Bankers, to the amount of 1779*l.* 13*s.* 11*d.* In *March*, 1803, the Bankers accepted bills, drawn by *Eldarton*, to the amount of [illegible]*l.* which he discounted, and paid only 1000*l.* towards providing for those bills, which became due, after the house had stopped payment. Upon that event a separate Commission of Bankruptcy issued against *Agnew*; under which Commission *Eldarton* proved a debt of [illegible] on account of principal and interest, due under the agreement of the 27th of *March*, 1802. In *July*, 1803, *Eldarton* in consideration of 3500*l.* assigned his debt to *Mary Tullock*.

The petition was presented by the trustees under a general assignment of the estate of *Strange, Dashwood*, and Co., stating these circumstances, that the patent was void: that a writ of *scire facias*, to try the validity of the patent, was obtained, upon which issue was joined; that an action was brought by *Eldarton* against the Assignees of the separate estate of *Agnew* for a dividend; that the assignment to *Mary Tullock* was made without considera-

(1) See *Dale et al. Ex. of Fulton v.* ... *American* and *English* cases there cited, and ...*ooke*, 4 Johns. Cha. Rep. 14, and the ... remarked upon by the *Chancellor*.

tion, with a view to obtain payment of the dividend from the separate estate of *Agnew*, while the debt of *Elderton* was due to the joint estate, suggesting, that as the separate estate will be more than sufficient to pay the separate debts, the joint creditors are ultimately interested in the question, and praying, that *Elderton* and *Moore Elderton* may be restrained from proceeding at Law against the Assignees of the separate estate of *Agnew* for the dividend, until after the trial as to the validity of the patent, and, that, if the right to the patent shall be established, all proceedings in the action for the dividend may be stayed, until payment by *Elderton* of the debt of 4,779*l.* 1s. 11*d.* due by him to the joint estate, and until he shall have taken up the bills for 8000*l.*

1805.

Ex parte Elderton.

[* 318

The Attorney-General, and *Mr. Romilly*, in support of the Petition.—The decision of Lord *Rosslyn* in *Ex parte Quintin* (a) is an authority for permitting the set-off in this case. It would be hard, that this separate creditor should receive the benefit he seeks out of the separate estate, without an obligation on the other hand to pay his share of the other debt. It is suggested, that *Agnew's* estate will probably be solvent. Suppose the sum of 4000*l.* coming out of his separate estate to the general partnership: would it be just, that *Elderton* indebted to the general partnership should take that fund, and then, having made away his property, should present his own insolvency, as all the satisfaction to be had from him? Every principle requires this equitable arrangement: not to set off a separate against a joint debt, but to have effect against the balance, in which each is interested, clear of the demand of the other. The interest of the partners, not liable to the separate debt, cannot be affected. This does not depend upon any account; as it is clear, the debt, due by *Elderton*, is much more considerable than that, which is due to him. This question of set-off occurred lately (c) in the Bankruptcy of *Castell* and *Powell*.

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The Lord CHANCELLOR.—In the case *Ex parte Quintin* (b) the partnership debts were actually paid. I do not quite understand it. But, if there are debts, which cannot be set off at Law, can it be said, that all the affairs of the Bankruptcy are to be suspended until all the accounts are cleared, in order to see, what rights of set-off there may be in the result? That should have been considered before that case was determined. The consequence will be, that, where there are joint and separate debts, which cannot be set off against each other at Law,

Joint and separate debts cannot be set off against each other at Law.

(a) 3 Ves. vol. iii. 248. (c) p. 319 Ex parte Stephens, ante, 1.
(b) 3 Ves. vol. iii. 248.

1805. Ex parte TWOGOOD. in every Bankruptcy the proceedings must be suspended, till the accounts are taken, and it is seen, what the joint estate will pay, and what the separate will pay. Another difficulty in that case, which I do not understand, is this: the Commission was against *Shepherd* alone. *Williams* paid all the partnership debts. Then, if demands were due to both, those demands would be recovered in their names; and then, if upon the account between them there was a clear surplus to *Shepherd*, that would be part of his general separate estate, to be handed over as such to his Assignees, in trust for all his separate creditors; and would not be left in the pocket of the one creditor, who paid that joint debt; but would be divisible, as part of the separate estate, among all the separate creditors. The circumstance, that there was a great number of other separate creditors, was not in the least attended to in that case. If it could be made out, that all the separate

[520] creditors were paid [illegible] not upon the ground [illegible] from that moment [illegible] dividual creditor. But [illegible] to take the account [illegible] in trust, not [illegible] separate creditor [illegible] debts being paid, [illegible] vided, not according [illegible] ditors, but according to the [illegible] between themselves [illegible] tuted by [illegible] paid to the joint estate [illegible] partnership debt [illegible] credits to get these credits [illegible] himself right.

For the Petition.—*Williams* was [illegible] which was his proportion.

Mr. *Cooke*, for *Mary Pollock*, an Assignee of a Debt. The claim of set-off is in opposition to a case at Law, before Mr. Justice *Buller*, and *Ex parte Christie*;(*a*) There is no instance of a bill to relieve the hardship at Law in not setting off these demands. Courts of Equity will not assume such a jurisdiction; and have not gone further than the Law: *Ex parte Orlebender*;(*b*) requiring mutuality; that the debts shall be due in the same right, &c. as at Law. The Assignee of this debt is in a different

[521] situation in Equity from that, in which she would stand at Law: a chose in action being assignable in Equity. There is no privity, enabling these petitioners to file a bill. The case, *Ex parte Quinten*,(*a*) relies altogether

(*a*) *Ante*, vol. x. 105. (*b*) 1 *Atk.* 235.
(*a*) p. 521. *Ante*, vol. iii. 248.

upon *Ex parte Edwards*, (b) which does not appear to have received a decision, and probably ended by compromise. 1805. *Ex parte* Tame.

The Lord CHANCELLOR.—I do not deny that there is a good deal of natural equity in the proposition upon which this petition stands; but, pursuing it through all its consequences, it would [illegible] all the habitual arrangements in Bankruptcy, that I should do it. *Aug.* 27

Petition dismissed.

Ex parte JAMES. [illegible]

[illegible] offered to prove [illegible] Bankruptcy against [illegible] his bill of costs [illegible] evidence to the [illegible] that bill he [illegible] on account of [illegible] when the [illegible] were not the receipt of [illegible] and the same [illegible] according to the direction of the Bankrupt, and at the time of the Bankruptcy no part remained [illegible] of the petitioner [illegible] he was not bound to answer more fully.

[Margin note: Proof under a commission [illegible] refused, he refusing [illegible] the receipt of money and [illegible] application [illegible] might tend to criminate him.]

At another meeting, the petitioner stated, that he had not received any sum of money on account of his said bill of costs, except the sum [illegible] in that bill to the credit of the Bankrupt; and, if he ever did receive any other sum, which he did not admit, of the Bankrupt's, he did not receive it on account of the bill of costs: but, if received, it was paid over according to the direction of the Bankrupt, and no part was then, or at the time of the Act of Bankruptcy in the petitioner's possession. The petitioner, being then asked, if in fact he ever had received any sums from the Bankrupt, except what were specified in the bill of costs, he refused to answer; giving as the reason of that refusal, that the answer might tend to criminate him. He stated, that he had spoken [* 322]

1805.

Ex parte Simms.

the whole truth, with the exception of the matters alluded to in the preceding answer; and offered to swear, that he had not refused to answer for the purpose of concealing any fact, which would show fraud by the Bankrupt or the petitioner; or would affect the estate, or benefit the creditors: but the Commissioners refused to receive that deposition, or to admit him to prove the debt. The petition further stated, that the Commissioners refused to permit him to prove, upon the ground, that he had received sums of money from the Bankrupt, the application of which he had not accounted for, which was also stated by the Certificate of the Commissioners, as the ground, appearing by the examination of the Bankrupt.

The Attorney-General, for the Petition. Mr. Romilly, for the Assignees.

[523] *The Lord* CHANCELLOR.—This is a new and very important question. The Certificate imports what is contrary to the statement of the petition, which does not amount to an admission, that the petitioner did receive any money. The statement is singular, that, if he ever did receive any, it was applied for the use, and according to the direction, of the Bankrupt; protesting against declaring, whether he did receive any. It comes to this. The Bankrupt upon his examination asserts, that the petitioner did receive different sums, which were not accounted for. It does not appear, whether the Bankrupt, was examined to the application according to his direction and for his use. His examination might have raised the neat question, whether, if the money had been so applied, in a question between the creditor and the person making the application, he could have discharged himself from the receipt. If the question comes to be decided by the examination of the petitioner, it stands thus. *Primâ facie*, upon proving a bill of costs, the creditors have the same right to inquire, what the party received on account of his principal, with a view to set-off, as if both parties solvent were contending. If the ground of the Commissioners was, that the petitioner's refusal to answer amounted to an admission, that having received sums of money, he had illegally applied them, that is an incorrect mode of reasoning. the principle enabling him in a Court of Justice to say, that, if they have no more information than they can have from him, they have no information upon which they can act. It would be a singular application of the principle to hold, that, the Law protecting him from answering, they shall use that protest as distinct evidence of guilt, as if it was confessed.

[524] But, take this in another point of view, whether the parties have not a right to know from the individual, as

to the fact alleged and sworn by the Bankrupt, that he has received different sums of money; first, whether he has received the money; 2dly, how it has been applied. The first question, if connected with the other, has a tendency to bring him into that situation, in which he may avail himself of the principle, protecting him from a criminal prosecution. The consequence of his refusal to tell whether he received money, and how it was applied, is not, that any Court can say, he has illegally applied it; but every Court may say, if the party will not give that information, which is necessary to decide upon a civil right, they must proceed upon that, which is evidence: viz. the Bankrupt's oath, that the petitioner did receive money: and, if he will not say, whether he did, or did not receive it, so that opportunity may be given by investigating and pursuing it to the persons, to whom it was paid, to get at the truth, the result is, not, that I shall tell him he shall answer, or, that, as he has not answered, he is guilty: but, that, if he will not furnish the means of satisfying the Commissioners, whether the money was properly applied, or improperly, or was not applied, the effect of his protest against answering amounts to this, that it must be concluded, there is a purpose which makes it preferable to him not to place himself in that situation, in which it is possible to decide the true state of the account. But, I think, this has not been examined yet upon its true principles: and considering the difference of the Certificate and the representation in the petition, the Commissioners should again give him an opportunity of applying, and should call upon the Bankrupt to be examined as to the payment, and the application of the money, and, if they shall refuse to receive the proof, they may specially certify the effect of the examination of both. [525]

1805. Ex parte Symes.

An order was pronounced accordingly, but with this qualification; if the petitioner and the Bankrupt think proper to be examined. Another meeting was called, at which the Bankrupt repeated his statement as to the fact of the receipt of money, and that he had no doubt, the whole was applied to election purposes, according to the trust reposed in the petitioner; but knew nothing of the fact. The petitioner still declined to make any further admission or disclosure than upon his former examination.

The Lord CHANCELLOR.—This debt cannot be proved. The proposition is clear, that no man can be compelled to answer what has any tendency to criminate him. But

Aug 27. No person compelled to answer what has any tendency to criminate him. (1)

(1) See the doctrine fully stated by Chief Justice Marshall in *Burr's Trial*, vol. i. p. 242 (*Robinson's* Report) See, also, page 207 to 2[illegible]

1805. Ex parte Simms. the consequence is inevitable; that if it can be established, that he has received money that belonged to the Bankrupt, and he chooses to protect himself against answering as to the application, he comes under the difficulty, that he cannot discharge himself of the receipt of the money. Individually, I have no doubt the petitioner applied this money according to the directions of his employer. But the petitioner still declining to answer, the question is, whether in Bankruptcy, having traced to a person, coming to prove a debt, money, for which he is *prima facie* accountable, the creditors, as well as the Bankrupt, have not a right to insist, that he shall discharge himself: and, if he chooses to say, he cannot, without showing he has done something illegal, the consequence is, money is traced

[526] to him, and he cannot prove it has gone from him; and therefore necessarily it must be considered as still in his hands.

Petition dismissed.

1803 *November* 28
1805 *Aug* 27

LORD ST. JOHN *v.* LADY ST. JOHN.

Matter in an answer, relevant, according to the case made by the bill, not scandalous, whatever may be the nature of it (1)

As to the validity in Law or Equity of articles between husband and wife for future separation, even with trustees, in this instance providing, that the wife may at any time with the assent of the trustees or the survivor, his executors or administrators, separate, and take away the children Query.

LORD and Lady *St. John* having lived apart under articles of separation, a reconciliation took place: upon which occasion another instrument was executed by them and two trustees: providing, that Lady *St. John* might at any future time, with the assent of the trustees, or the survivor, his executors or administrators, separate from her husband, and take away her children, and upon such separation reviving the provisions of the former articles. The bill, filed after a second separation, to have these instruments delivered up, inquiring as to the existence of disputes, and the cause of the separation, the answers stated several circumstances of conduct, previous to the first separation, as well as after the reconciliation; as to which they were referred for impertinence and scandal. The Master's judgment being in favour of the answers, an exception was taken to his report.

Mr. Romilly, and Mr. Greenhill, in support of the Exception, contended, that any facts, not material to the decision, are impertinent, and, if reproachful to any of the parties, scandalous: that impertinence may be ascertained, by trying whether the subject of the allegation is

{(1) *Woods* v *Morrell*, 1 Johns. Cha. Rep. 106}

matter, that could be given in evidence between the parties. They cited *Ex parte Topham.* (a) 1805.

* *The Attorney-General, Mr. Mansfield, Mr. Piggott, and Mr. Wooddeson, for the Report.*—The defence of the trustees cannot be distinguished from that of the wife. The trustees are bound to defend the deed put into their hands, and to support her interest. In such a suit, the circumstances, that led to the separation are extremely material; and if relevant, they cannot be scandalous or impertinent: *Fenhoulet* v. *Passavant* (a) If the deed is void at Law, the Plaintiff cannot be hurt; but the conduct of the husband may have been such, that this Court will not help him, or deprive the wife of the protection, to which she may be entitled. The circumstances stated in the answer, therefore, though certainly they will not alter the construction of the deed, may be material. The Defendant is asked by this will, whether disputes did not arise. She answers in the affirmative; and explains what they were. The Court will see, that it is utterly impossible, that the passage can be relevant, before they will expunge it. But, without considering strictly the relevancy, it is sufficient, that the bill gives occasion for these passages, in which respect there is a distinction between a bill and an answer. It is put upon the Defendant to show, what were the grounds of her consent to separation. The point, whether it was reasonable, or unreasonable, might depend upon the amount of provocation. In *Guth* v. *Guth*, (b) *The Master of the Rolls* collected all the authorities, and upon full consideration of them decreed a specific performance of articles of separation at the suit of the wife. A necessary consequence is, that the Court would grant an injunction against the husband, suing in the Spiritual Court, which was the question in *Booth* v. *Booth*, (c) mentioned by Lord *Alvanley*: but the result of the application in that instance does not appear. The express stipulation in this case distinguishes it from *Fletcher* v. *Fletcher*, (a) in which Mr. Justice *Buller*, sitting for The Lord *Chancellor*, held, that the subsequent cohabitation put an end to the deed. Before the Court will decide, that this instrument is to be delivered up, leaving the husband to the exercise of all his rights in that character, the Court will know, how he has acted towards his wife; whether their society has been, and is likely to be, happy.

Lord St. John v. Lady St. John

[* 527]

[528]

(a) In Chancery, before Lords Commissioners *Eyre*, *Ashhurst*, and *Wilson*.
(a) p. 527. 2 *Ves.* 24. *Coffin* v. *Cooper*. *Ante*, vol. vi. 514.
(b) 3 *Bro.* C. C. 611.
(c) In Chancery, before Lord *Hardwicke*.
(a) p. 528. 3 *Bro.* C. C. 619, n.

1805. Lord St. John v. Lady St. John

Mr. Romilly, in Reply.—That distinction upon the express stipulation in this case, cannot be maintained. Notwithstanding the case of *Lord Rodney* v. *Chambers*, (b) such a condition cannot be valid. Consenting to live together they cannot stipulate, that at a future period they will not live together as husband and wife. Even, admitting, that the wife is to be considered as a *feme sole*, that provision cannot be valid, for it would not be valid, if in an original settlement, previous to marriage. A man cannot before marriage stipulate, that he will be separated from his wife at a certain period, not knowing, what will be the state of his family at that time. The Plaintiff could not legally stipulate, as he has attempted, that he shall have no authority over his daughters; having at that time four daughters. The wife is to have authority to dissolve the marriage, unless these trustees interpose, and do not approve it: a new jurisdiction, substituted in the place of the Ecclesiastical Court. This extraordinary power is vested in both these trustees, and the survivor, and the executors and administrators of the survivor: so that it might come to a creditor. By
[529] the express terms of the instrument she has power to dissolve the marriage as often as she pleases. It was not necessary in answer to the question, whether great disputes did not arise, to state, what those disputes were. This Court has no authority to enter into the circumstances of the husband's conduct, and the state of society, in which they live, but must decide upon the validity of the deed, according to the established rules of Law and Equity. Those questions are by the constitution of this country to be decided by the Ecclesiastical Court. There are very few decisions upon this subject, and it is of great importance, that it should be well understood, what is impertinent and scandalous, and what is not so.

The Lord CHANCELLOR upon this occasion went much at large into the consideration of the legal effect and validity of such an instrument as was the subject of this suit.

The question, furnished by a case of this sort, is one of the most important to the public interest, that can fall under discussion in a Court of Justice. When I see such *dicta*, as occur in the case of *The King* v. *Mead*, (a) falling from great men, and establishing a course of decision, that can be demonstrated to stand upon no principle consistent with the law of the land, I feel great difficulty in deciding upon such authority. Considering

(b) 2 *East*. 283. (a) p. 529. 1 *Burr*. 542

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After a deed of separation executed the wife is not to all intents and purposes a *feme sole*. She cannot be a witness against her husband, or be guilty of felony in his presence: nor can an action be maintained against her.

the consequences, and the late cases,(h) I am now authorized to say, no attention is to be paid * to the *dicta*, that after a deed of separation executed the wife becomes to all intents and purposes a *feme sole*. How does she get into that situation? She cannot execute any deed. She has not the power of contracting. The first consideration therefore, independent of all principles of policy, is, how does that become the contract of the wife. 2dly, if the husband can enable her to do that, does she become to all intents and purposes a *feme sole*? Can she be a witness against her husband? Can she be guilty of felony in his presence? Twenty-five years ago I could have asked with confidence, could an action be maintained against her; and I can now say there is no principle for that proposition, which however, prevailed through a long course of decisions, founded upon *dictum* followed by *dictum*: but, when it became necessary to state the principle, it fell, and all the Judges agreed, that it was impossible to maintain an action against her as a *feme sole*.

Independent of the effect of the contract of marriage itself, the rule upon the policy of the Law is, that the contract shall be indissoluble, even by the sentence of the Law: to a certain extent the Legislature thinking it for the interest of the community that it should not be dissolved except by the Legislature: upon the principle probably, that people should understand that they should not enter into these fluctuating contracts; and, after that sacred contract they should feel it to be their mutual interest to improve their tempers. If such a contract as is contained in the second of these instruments, an engagement under the hand of the husband, that his wife and children shall be free from all control by him, that she shall dwell in his house, as long as she pleases, and take herself away, when she pleases, could not be infused into a marriage settlement, (and it is to be observed, that before marriage she has more capacity to contract than afterwards,) how can it be the subject of subsequent stipulation? The consequence would be constant misery. [531]

Then, how is it as to the children? The father has control over them by the Law, as the Law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by Law contract with him, (and in this instance the contract as to the children is between the husband and wife only,) it deserves great consideration, before a Court of Law, should by *habeas corpus* upon a

(h) *Beard* v. *Webb*, 1 *Bos. & Pul.* 93. *Marshall* v. *Rutton*, 8 *Term Rep.* 545.

1805. *unilateral* covenant as the *Scotch* call it, take from him the custody and control of his children, thrown upon him by the Law, not for his gratification, but on account of his duties, and place them against his will in the hands of his wife

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Upon this particular case the questions are, 1st, are these deeds good at Law. 2dly, are they to be enforced in Equity, 3dly, if not good at Law, are they to be delivered up in Equity. If they are good at Law I see no reason at present to say, they are not good in Equity. But, as against the wife, it is impossible either in Law or Equity to hold them good, for she cannot execute any deed. I frequently asked Mr Justice *Buller*, who found it difficult to answer that, how, if she was in the same situation as a *feme sole*, she got into that situation. It is admitted, that, until separated, she cannot form or make herself liable to any contract: yet it is asserted, that it is competent to her, before she is in that state, to remove herself by contract out of the state, in which she is, into that in which she will for the first time become capable of making a contract

A married woman cannot execute any deed generally.

[532] Then, as to the husband, is he according to the policy of the law, capable of making such a contract? As to the case of *Guth* v. *Guth*, (*a*) I feel with Lord *Rosslyn* all his doubts upon that case, (*b*) which, notwithstanding what is said in *Lord Rodney* v. *Chambers*, (*c*) is the only instance, in which the Court did enforce the deed. The question has never been put upon the contract of the husband and wife, The Court has always put it upon the contract between the husband and the trustee, from the covenant of the trustee to indemnify the husband against her debts, the existence of which covenant ought to have reminded the Court, that those, who framed these instruments, had no idea that the wife herself was bound. In that way of considering it, the question occurs, what was to be done, if the husband had sought to get back his wife by force: that is, by the force of his marital right; which, according to *The King* v. *Mead*, (*d*) would be an indictable offence: but that I desire may not be understood as being universally acceded to, until it shall be determined upon a special verdict. Consider the consequences. The contract of marriage cannot be affected by any contract between the parties. It is admitted every where, that by the known law, founded upon policy, for the sake of keeping together individual families, constituting the great family of the public, there shall be no

Marriage not to be affected by contract between the parties.

(*a*) 3 *Bro* C C 614.
(*b*) *Legard* v *Johnson*, *ante*, vol iii. 352. See page 361.
(*c*) 2 *East*. 283. (*d*) 1 *Bur* 542

separation *a mensa & thoro*, except *propter sævitiam aut adulterium*; and I believe they held, with Mr Justice *Buller* in *Fletcher* v. *Fletcher*, (e) that even where the separation is for such cause, if once they come together again there is a complete end of it, and that can never again be made a cause of complaint for the same purpose The Ecclesiastical * Court will not read these deeds, but determines, whether there has been *sævitia aut adulterium*, and, if there has not, in the [illegible] of the Judge, he is not only prohibited from [illegible] that they shall be separate, but he is by the [illegible] to oblige them by sentence to reside together [illegible] of the Law would be strange, if the trustees might come to this Court, saying, the Court has no jurisdiction to try the conduct or misconduct of the husband and wife for this purpose; the Law has not permitted them to contract for separation; but the trustees have covenanted to indemnify the husband against the debts of the wife, that the inducement to do that, something like a consideration, was the hope, that the wife would be permitted by the husband not to perform the duties of the most sacred relation, in which she had placed herself, that their object in entering into that covenant would be disappointed, and therefore desiring the Court, not specifically to perform the covenant, but to compel the husband to permit his wife to live separate In *Guth* v. *Guth* (a) that was done; as it was the deed, not of the wife, but of the husband But suppose, the wife was suing for the restitution of conjugal rights, saying, that it was not her deed; but, if it was, they could not look at it what a strange state of circumstances, if, the husband suing in the Ecclesiastical Court, the trustees could come to this Court to compel him to give up his rights, but, if the wife sues, the same Equity fails, for it is impossible to say, the wife is bound in any degree by a deed of this sort Independent, therefore, of all difficulty upon the policy of the Law, there is difficulty upon the remedies to be given in the different Courts.

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Lord St John v. Lady St John

Separation *a mensa & thoro* in the Spiritual Court only *propter sævitiam aut adulterium*; and after reconciliation the same cause cannot be revived (1)

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It is very difficult upon true principle, with reference to the policy of the Law, to maintain the *dicta* upon this subject. No case has gone to this extent, that the husband may enter into a contract, not to separate, upon the ground of differences existing at the moment, but, determining, that it is fit at that moment to live together, to leave it altogether to the discretion of the wife to say, whether that cohabitation and performance of duty to the children by their keeping together is to continue a month

(e) 3 Bro C C 619, n (a) 3 Bro C C 614

{(1) See the note to *Legard* v. *Johnson*, *ante*, vol iii. p 359 }

1805.

Lord ST. JOHN
Lady ST. JOHN

or six weeks; or, that either shall regulate, how long they shall continue to live together, upon the principle that party shall think proper. If that can be so, I agree with *Mr. Romilly*, there is no reason why it should not be in a marriage settlement. But we are running counter to the Law of the Ecclesiastical Court indeed, if it is the Law of that Court, separating for adultery or cruelty, that by returning the past offence is pardoned; and we say, under such circumstances it is competent to a husband and a father, upon whom the Law has imposed duties with regard to the wife, and sacred and affecting duties, with reference to the public, as to the children, to stipulate with his wife, though she cannot contract to bind herself for sixpence, even the trustees not parties, that, whenever she chooses, she shall have no duties imposed upon her, and he shall be a husband and a father, freed from those duties, which the Law throws upon him. It is impossible for the Court to maintain such a contract. It is said, this is checked by the trustees. How is it checked? If it is good as contract, it is enough to say, upon the contract there is this right, and the Court has nothing to say to the acquiescence of the trustees. But is the Judge of the Ecclesiastical Court to say, though there is no allegation of adultery or cruelty, the trustees have determined, that [535] these persons are to separate? He can look at their act as nothing, and must compel the parties to reside together. Then are they to say here, I have no jurisdiction as to adultery or cruelty, but upon the certificate of the trustees it is fit, that the contract of marriage should be dissolved? It is impossible specifically to perform such an agreement.

Next, is it to be delivered up? That is a very different question, I admit, in many cases. If the first deed was absolutely void originally, or became so by subsequent reconciliation, notwithstanding the subsequent contract, and if the subsequent contract is void, is there any necessity to come here? I have lately had occasion to deliver my opinion that the decision of a Court of Law, that upon grounds of policy, or for other reasons, an action will not lie, does not destroy the old jurisdiction of this Court: particularly, where the instrument is void upon grounds of policy. If it is void at Law, there is no doubt, that, being against the policy of the Law, this Court would order it to be delivered up. The next consideration is, whether the conduct of the party applying will induce the Court to refuse to exercise the jurisdiction. This is very important as to the relevancy of a great part of this record, for, if the Court is bound to deliver up

Jurisdiction of Equity to order an instrument to be delivered up; though void at Law, as if against policy (1)

{(1) *Hamilton* v. *Cummings*, 1 Johns. Cha. Rep. 517.}

the instrument, as against the policy of the Law, it was sufficient for the Plaintiff merely to state that, and that all conduct was out of the consideration of the Court. It is said, supposing the instrument void by the policy of the Law, it may be of great importance at the hearing to see, what has been the conduct of the Plaintiff, as upon that the Court may stand neuter, and let him take the chance at Law. I have considerable doubt upon that, for the authorities go to this, that, where the transaction is against policy, it is no objection, that the *Plaintiff himself was a party in that transaction, which is illegal. In *Shirley* v. *Ferrers*, in the Court of *Exchequer*, a few years ago, the case of a marriage brocage bond, the Plaintiff was a party to the transaction, *particeps criminis*: but the Court held, that, where the relief is upon the policy of the Law, that is not material: the public interest requires that the relief should be given, and it is given to the public through that party. (a)

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Where the transaction is against policy, relief to a *particeps criminis* (1)

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The point therefore, whether any part of this answer is relevant, with reference to this, depends upon the doctrine as to instruments, void on the ground of the policy of the Law. There is a great distinction between the different parts of the answer upon that, for, as to what has passed since the reconciliation, if conduct is to be looked to, it is one thing to say, the Court will look at the conduct since the reconciliation, as the ground of the second separation, and a different consideration as to what passed before the reconciliation, as the ground of acting with reference to the second separation. The Ecclesiastical Court will not go back to what passed before the reconciliation; and then, unless the bill calls for it, how is the statement of the conduct, previous to the first separation, relevant, unless as giving complexion to, and forming the nature of, the conduct between the reconciliation and the second separation. Lord *Thurlow* expressed great difficulties upon this point. His difficulty upon enforcing the covenant as between the trustee and the husband, which was Lord *Kenyon*'s principle in *Stephens* v. *Olive*, (b) many of whose opinions upon this subject were shaken in *Shirley* v. *Ferrers*, (a) was, that the covenant was to enforce that, which the Ecclesiastical Law would not permit. He doubted, therefore, whether covenants with such objects ought to be the foundation either of action or specific performance. That doubt has long had place in my

The Ecclesiastical Court in a suit for separation, will not consider conduct previous to a reconciliation.

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(a) See *Neville* v. *Wilkinson*, 1 *Bro. C. C.* 543. *Eastabrook* v. *Scott*, *ante*, vol. iii. 456, and *Scott* v. *Scott*, in the Court of *Exchequer*, there cited 458.

(b) 2 *Bro. C. C.* 90.

(a) p. 537. In the Court of *Exchequer*.

{(1) See the note to *Watts* v. *Brooks*, *ante*, vol. iii. p. 612.}

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mind. If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action, or a suit in this Court. But, if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the Law, I cannot upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled Law upon the subject. It is better, that the case should go to the House of Lords, than that the Law should remain in this state, upon a point, connected with the very well-being of society.

1805. *Aug* 27. Articles of separation put an end to by reconciliation. (1)

The Lord CHANCELLOR.—The object of this bill is to have articles of separation delivered up. In general, according to the doctrine of the Ecclesiastical Court, when a reconciliation takes place, there is an end of such an instrument. When these parties came together again, another instrument was executed, upon which it is contended, that this general doctrine will not apply: that reconciliation taking place upon an agreement in writing, that, when the wife with the assent of these two persons should think proper to separate from her husband, and to take away her children, all the clauses of the old instrument should revive. This bill means to insist, that upon grounds of public policy and Law these instruments ought to be considered invalid, and not remain with the trustees, and, whenever this cause comes to a hearing, it will furnish questions of great importance: 1st, whether it has ever been determined solemnly, as I see, it is taken in the Court of King's Bench (*a*) to have been frequently determined, that this Court will specifically execute an agreement for separation, regard being had to the circumstance, that the Law allows separation only for adultery or cruelty, also, that, unless this Court will grant an injunction against such a proceeding, as this instrument cannot in any Court be considered the deed of the wife, it is competent to her, and perhaps to the husband, to sue in the Ecclesiastical Court for restitution of conjugal rights. [538]

But the question here is, not, simply, whether upon existing differences persons may so agree; but, whether such an agreement as this is to be permitted; placing the wife in such a situation, that she may withdraw herself from her husband, and also take her children from his roof and his care: the father having imposed upon him

(*a*) See *Lord Rodney* v. *Chambers*, 2 *East* 283

{(1) See *Tiffin* v. *Tiffin*, 2 Binn. 202.}

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the obligation to maintain and educate his children; and professing himself to be willing to fulfil that obligation: whether the wife with two trustees can by contract, and, by anticipation, determine, that causes of separation shall exist in future; and can act upon causes, not authorized by the Law, a subject of very serious consideration, not only with reference to husband and wife, but also as to the duties and obligations of parents and children.

If the bill had duly brought these instruments before the Court, and claimed upon grounds of Law, Equity, or policy, that these articles should be cancelled, and the answer had insisted upon the validity of the instruments, and contended, that by contract the husband had no right to relief, that would have been a sufficient answer. It is [539] to be lamented, that all this conduct is brought upon the record: but the bill is so framed in the interrogating part, that the differences between the parties, the reasons of the separation, and for insisting upon it, and holding these instruments, as evidence of the title of the Defendants to insist upon it, are all subjects of inquiry. The suit therefore involves the consideration, not only, whether the deed is void, but, whether this Court is to do nothing with reference to the conduct of the parties. The questions and the nature of the suit being such, it is impossible to say, those parts of the answer, which are contended to be irrelevant and scandalous, are so. If relevant, whatever may be their nature, they are not scandalous. The matter therefore appearing upon this answer is not scandalous, as it is relevant; and it is not irrelevant, as it may have an influence upon the suit, attending to the nature of it.

The exception to the report was overruled, and the suit soon afterwards ended by compromise.

END OF THE SITTINGS AFTER TRINITY TERM.

CASES

IN

CHANCERY, &c.

MICHAELMAS TERM, 46 GEO. III. 1805.

1805.

Nov. 16.

Ex parte BOWES.

General order in Bankruptcy, that affidavits in support of a petition to stay the Certificate shall be brought into the office together with the petition, except such as shall be necessary in reply to affidavits in answer to it.

THE object of this petition was, that a Bankrupt's Certificate should be staid.

Mr. Romilly, in support of the Petition, pressed for liberty to file subsequent affidavits, in support of the petition, in answer to the affidavits filed in opposition to it.

The Lord CHANCELLOR observed, that Lord *Rosslyn's* rule, that all affidavits to stay a Certificate must be filed, when the petition is presented, (a) created great inconvenience, and suggested, that it would be better to relinquish it, the consequence being, that all affidavits in opposition to such a petition are made without any danger of contradiction, which is particularly mischievous in Bankruptcy.

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It was then objected at the Bar, that the alteration proposed, would produce hardship to the Bankrupt by the delay. But *Mr. Cooke, (amicus curiæ,)* said, he was confident from what Lord *Rosslyn* had frequently said, that his Lordship meant no more than that the facts of such a petition should be verified by affidavit.

The Lord CHANCELLOR said, the object of such a petition is frequently only to wring money from the friends of the Bankrupt, that it was very hard certainly, that the Certificate should be staid upon presenting a petition without having the facts verified by affidavit, but, if there is an affidavit, verifying the facts of such a petition in all

(a) *Ex parte Butt, ante,* vol. 1. 359.

respects, the course should be the same as upon any other petition. His Lordship desired it to be so understood in future; and proceeded to hear this petition; declaring, that he should not attend to those parts of the affidavit against it which the petitioner had no opportunity of answering. 1805. *Ex parte* Brown.

The Lord CHANCELLOR in the course of this petition declared his opinion clearly, that, if the direct object in taking out a Commission of Bankruptcy is to prevent the execution of a creditor, that is no objection to the Commission; provided it is the Commission of a creditor; and not that of the Bankrupt; which is always vitious.

No objection to a Commission of Bankruptcy, taken out by a creditor *bonâ fide*, not at the instance of the Bankrupt, that the direct object is to prevent an execution.

In consequence of what passed upon this petition, the following general order was afterwards made

In the Matter of Bankruptcy, [542]

16th *Nov.* 1805.

Lord CHANCELLOR.

I do hereby order and direct, that from henceforth the affidavits to be made use of at the hearing of any petition to stay a Bankrupt's Certificate on the part of the petitioners shall be brought into the Office of my Secretary of Bankrupts, together with the petition, (save and except such affidavits as shall be necessary to be made in reply to any affidavits made in answer to any such petition.)

ELDON. C.

1805.

Nov. 7, 18.

WALLACE v. POMFRET.

Parol evidence admitted, and prevailed, against the presumption, that a debt is satisfied by a legacy of greater amount; the will also affording an inference in favour of that presumption (1)

ROBERT JONES MORETON, by his will, dated the 11th of *May*, 1801, after several legacies and Annuities, and among them to *George Wade*, one of his trustees and executors, the sum of 500*l.* over and above what the testator might owe him on balance of any account or otherwise at the testator's death, proceeded to give the following legacies.

"And to my servant *James Staines*, if in my service "at the time of my decease, 10*l.* over and above all such "moneys as I shall owe him for wages or otherwise; *and "I give to my housekeeper *Mary Pomfret* 1000*l.*"

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He then gave to *Mary*, the wife of *William Pomfret*, and mother of his said housekeeper, an Annuity of 20*l.* for her life, for her separate use, and to *Elizabeth Pomfret*, sister of his said housekeeper, 100*l.*, and to the said *William Pomfret* 10*l.* He then appointed *Michael Wallace* and *George Wade* his executors: and gave all the residue of his personal estate and the money to be raised by the sale of his real estate "after payment of my debts, fune-"ral charges, and the probate of this my will and the "aforesaid legacies," to *Wallace* and *Wade*, their executors, &c.

The testator died on the 12th of *July*, 1801. The bill was filed by the executors against *Mary Pomfret*, the legatee of 1000*l.*, praying, that the legacy may be declared to be a satisfaction of the sum of 125*l.* 12*s.* 6*d.* claimed by the Defendant as wages due to her from the testator.

The Defendant by her answer, supported by evidence, insisted on her claim for four years wages, which she had permitted to run in arrear at the request of the testator; who undertook to lay it out for her; and also upon her right to the legacy. Her mother by her depositions stated, that the testator about the latter end of *May* preceding his death sent for the deponent into the parlour, and told her, he had made his will and left something to them all; but that he had left the Defendant the most; for, if it had not been for her, he should have been dead long ago, and that, as to the money he owed the Defendant for wages, he expected to receive some money soon, and would, when he went to *London*, put her money out for her use, and she might receive

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the interest of it. The other evidence proved acknowledgments by the testator of the Defendant's care and at-

(1) See the note to *Lee* v. *Brown*, *ante*, vol. iv. p. 362.

tention to him, as nurse and housekeeper, and expressions of his intention in her favour. The evidence was read.

Mr. Romilly, for the Plaintiffs, relied upon the rule, that in these cases the debt is satisfied by the legacy; which rule, though it has been disapproved, has always been considered binding: *Chancey's* case (a) *Richardson* v. *Greese*; (b) also upon the inference from the intention expressed in this will as to other legacies, insisting therefore, that evidence could not be admitted.

Mr. Richards, and Mr. Thomson, for the Defendant.—Great dissatisfaction has always been expressed at the rule; every Judge exclaiming against it, and endeavouring to support any fair distinction, upon which its application might be avoided. This case has circumstances, by which it is distinguished. First, this debt is for wages to a servant; and Lord *Hardwicke* says, in *Richardson* v. *Greese*, (c) that this doctrine of satisfaction has not been applied to debts of that nature. The reason is, that, wages growing due from time to time, the amount of the debt is not certain at the date of the will; the debt therefore wants that character of certainty, which, in order to apply the rule as to satisfaction, is essential, as in *Rawlins* v. *Powel*, (d) a legacy was held not to be a satisfaction of a debt upon an open, running, account: the testator not at the moment understanding the precise amount. The evidence in this case is very important, and though evidence of this sort is to be received with some degree of caution, it is admissible. The testator in a conversation, subsequent to the will, alludes to the legacy he had given, and to the debt he owed, to the Defendant, and speaks of the mode he had adopted for payment of the debt; with a view to render the payment more advantageous to her. [545]

Mr. Romilly, in Reply.—It is very difficult to find a sound distinction between wages and any other debt, and the Court has never considered how the debt arose. That distinction is not taken either in *Chancey's* case, (a) or *Richardson* v. *Greese*, (b) though the Court seemed in distress for arguments to support the judgment, Lord *King* relying upon immaterial and superfluous words; and Lord *Hardwicke* upon the inference from not making the small addition of 5*l.* to what the testator had before given the Defendant.

Then as to the evidence, whether that will take this case out of the general rule: 1st, evidence as to the in-

(a) 1 *P. Wms* 408. See Mr. *Cox's* Note. *Lee* v. *Brown*, and *Tolson* v. *Collins*, *ante*, vol. iv. 362. 483.
(b) 3 *Atk.* 65. (c) 3 *Atk.* 65. (d) 1 *P. Wms* 297.
(a) *Ante*, p. 545. 1 *P. Wms.* 408. (b) 3 *Atk.* 65.

1805. Wallace v. Pomfret.

tention ought not to be received. Evidence is received to rebut the presumption, where there is not expression in the will showing the intention; but there is no instance of admitting evidence, where the testator has shown his intention by words found in the will. Then this evidence proves nothing; amounting to no more than that in the course of a conversation upon the will, not, as it seems, in the same sentence, the testator said, as to the money he owed the Defendant, he would put her money out for her use. It comes to this merely, that after making his will he spoke of what he owed her for wages as still [546] a debt, and to be paid. That does not show, that he did not mean satisfaction. The gift of the legacy did not make the other less a subsisting debt. He might also intend afterwards to diminish the legacy.

The Lord CHANCELLOR.—It would be too hasty to decide this case without seeing the will. If no new topic of argument arises upon the will, the case will turn altogether upon the question as to admitting the evidence, and the effect of it; for, whatever is due to the remark of Lord *Hardwicke*, that there is no decision, applying this rule to a servant's wages, this case is not to be decided upon the general rule of presumption; as the observations, capable of being applied to current accounts and wages, do not apply to a will, by a testator, contemplating, whether he shall by those acts of bounty satisfy such demands. First, he expresses his intention not to satisfy debts, that he owes or shall owe to other legatees. So, he imposes a condition as to another servant, of being in his service at his death, a condition not imposed as to the legacy to this Defendant. To that other servant he gives 10*l.* in addition to all such moneys as he shall owe him for wages, or otherwise: that legacy connecting itself, not only with the debt due at that time, but with any debt the testator might owe at his decease to that servant. Then immediately afterwards comes this legacy of 1000*l.* to the Defendant. As to two persons, standing in the same relation to him, and having demands of the same nature, he says, the legacy to one is to be in addition to wages; and does not say that as to the other. The presumption therefore, not upon the rule of law, but upon the whole will, is, that this legacy is not in addition to wages; the testator having expressly directed, that the other shall be in addition.

[547] The question, whether the evidence is admissible, or not, turns upon the point, whether the inference from the express direction, that the other legacy shall be in addition to wages, is strong enough to require a decision, that, as to this legacy, the addition to wages is, upon the face

of the will, necessarily excluded. If it is not, then upon the rule as to satisfaction of portions, (a) &c. these declarations may be admitted. If admitted, they are to be looked at with great attention; to see, whether the necessary effect is to beat down the fair inference from the written context; which is the most solemn declaration he can make; particularly as the parol declaration is not contemporary. The truth of the declarations may in a great degree be tried by the will itself. As to the effect of the declaration upon the written will, that is always a difficult question; seeing these declarations construed so very differently; which I am authorized to say by these two cases that have been cited. If this rule of presumption was once established, and understood to be the rule, it would have been infinitely better, that it should not be destroyed by small observations upon small circumstances; the Court trying to find out a distinction. It would have been better either to have abided by the rule, or to have said boldly, it should exist no longer. As to the case of *Richardson* v *Greese*, (b) supposing, the legacy of 500*l.* was a satisfaction of the debt, a legacy of 240*l.* was a very good reason for not giving that legatee 5*l.* with the other servants.

1805.

WALLACE v. POMFRET.

Parol evidence admitted upon the question as to satisfaction of portions.

The *Lord* CHANCELLOR stated *Chauncy's* case. (a) *Fowler* v. *Fowler* (b) before Lord *Talbot* *Hobbs* v. *Tate*, (c) a bequest of 250*l.* to a servant, to whom wages were due to the amount of 98*l.*, and the legacy was held not a satisfaction, on account of extraordinary services, not what the servant was hired for *Dassier* v *Chalcroft*. (d) *Stamer* v. *Wade*. (e) *Shudal* v. *Jekyll* (f) *Richardson* v. *Greese* (g) *Debeze* v *Mann* (h) The Lord *Chancellor* stated the last case from his own note, and the cases before Lord *Hardwicke* from the notes of *Mr Joddrell*, *Mr. Browne*, (the King's Counsel,) and Lord *Hardwicke's* manuscript notes; by which the printed report of *Richardson* v. *Greese* (i) appeared to be correct, Lord *Hardwicke* expressing his opinion, that by the penning of the will there

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Nov 18

(a) *Hinchcliffe* v. *Hinchcliffe*. *Sparkes* v. *Cator*, *ante*, vol iii 516 530 *Turner* v *Bayne*, *ante*, vol iv 508 *Robinson* v *Whitley*, *ante*, vol ix 577 See further as to the admission of evidence, *Pole* v *Lord Somers*, and *Drake* v *Denison*, *ante*, vol vi 309 365

(b) 3 *Atk* 65 — (a) p 548 1 *P Wms* 408.
(b) 3 *P Wms* 353. — (c) In Chancery, 1733
(d) In Chancery, 1740. — (e) In Chancery, MSS *Mr Joddrell*.
(f) 3 *Atk.* 516. — (g) 3 *Atk* 65
(h) 2 *Bro. C. C.* 165 519. — (i) 3 *Atk* 65

1805. WALLACE v. POMFRET.

was no satisfaction; and laying considerable stress upon the words, "after debts and legacies are paid." His Lordship then proceeded thus. (*k*)

All the cases authorize the admission of evidence: which is clearly to be admitted in this instance; and I am very sorry to add, that I think myself fully justified by all the cases in saying, that evidence has not only been admitted, but at least as much effect has been given to it, as can be said fairly to belong to it. I do not except from this observation even Lord *Thurlow* himself in the case of *Debeze* v. *Mann*; (*l*) for in that case his Lordship [549] held this upon the whole, that, though the testator had given the legatee 1000*l.* upon marriage, and afterwards in his life 600*l.* more, in all near 240*l.* more than the legacy, yet the legacy was to be paid; construing the expression, that there would be more hereafter, as his life was a bad one, as indicating an intention to give something more at his death; and therefore, that the gift of 600*l.* more between the marriage and his death did not satisfy that declaration. I think I may venture to say, a determination, taking the other course, might probably have been justified: the testator alluding to his death in no other terms than by saying, his life was a bad one. That case is decisive to show, that evidence must be admitted, and the length, to which the Court will carry it.

But, looking at the parol evidence in this case, it is infinitely stronger than in any of the cases in which evidence has had effect, provided it is believed; and there is great hazard, I admit, of deciding upon what is not true: but I have no right to reject this evidence as false. The first part of this declaration brings this very much to the case I have cited from *Mr. Browne's* (*a*) manuscripts, that the legacy was for her attention to him in sickness, and the wages for service. The subsequent part of the evidence is an express declaration, as to what he owed her for wages, that he intended to put her money out at interest. It is true, as has been observed by *Mr. Romilly*, he might have reduced the legacy: but the case, if put upon that, cannot be reconciled with what was done in the case upon Sir *Joseph Jekyll's* will, (*b*) and the other cases.

This legacy therefore is not a satisfaction of the debt. [550] The consequence is, the bill must be dismissed: but the effect of the parol evidence is so strong, that on that ac-

(*k*) This account of the beginning of the judgment *ex relatione*.

(*l*) 2 *Bro. C. C.* 165. 519. Stated also by The Lord *Chancellor* from his own Note.

(*a*) p. 549. The King's Counsel, in the time of Lord *Hardwicke*.

(*b*) *Shudal* v. *Jekyll*, 2 *Atk.* 516.

count I am justified by one of the cases (a) in dismissing it without costs; if the Plaintiffs will pay the legacy with interest.

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(a) Richardson v. Greese, 3 Atk 65 See page 70.

ROSE v. CUNYNGHAME.

No. 22.

A letter to a Solicitor, with directions for preparing the conveyance of a purchase, described generally as the land bought of A not specifying the terms, is not sufficient evidence of a contract within the Statute of Frauds. (1) Therefore the conveyance being subsequent to the will of the purchaser, and no previous contract according to the Statute, giving him an equitable interest, the estate did not pass by his will (2)

ROBERT UDNY, by his will, dated the 1st of June, 1801, gave, devised, and bequeathed, to trustees, their heirs, executors, administrators, and assigns, all and singular his freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, at Teddington, and all other his freehold, copyhold, and leasehold premises, whatsoever and wheresoever, and of what nature or kind soever, in Great Britain, and which at the time of his death he might be seised and possessed of, or entitled to, either in possession, remainder, reversion or expectancy, and of which he had power to dispose by his said will, except his freehold and leasehold messuages in Paternoster Row, upon trust to sell, and dispose of the money.

By indentures of lease and release, dated the 18th and 19th of August, 1801, Henry Peters, in consideration of 990*l*. paid by Robert Udny, conveyed certain estates to him and his heirs, to hold to him and his heirs, to such uses as he should by deed or will appoint, and, in default of appointment, to the use of Robert Udny and his assigns for life, without impeachment of waste, remainder to trustees for his life to prevent dower, remainder to the use of the heirs and assigns of Robert Udny

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* The testator died upon the 8th of January, 1802 Under an order, made upon the application of a purchaser of part of the testator's estates, for an inquiry, whether the devisees in trust could make a good title, or whether any and what part of the premises descended to the heir at law, the Master's report stated, that the Solicitor, employed by the testator in the purchase from Peters received the following letter from the testator, dated the 8th of November, 1800:

"I desired Mr. Bracebridge to acquaint you that I wish't "you to make the title to the land I bought of Mr. Peters, "and beg you will attend that it must be in bar of dower; "for which purpose it may be made to Edward Vaux,

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(1) See Grooms v. Coulder, 2 Desaus Cha Rep 171.

(2) M'Kinnon v. Thompson, Livingston v. Newkirk, 3 Johns. Cha. Rep. 307. 312.

1805. Ross v. Cunynghame

"Esqr. of *London*, Merchant, as trustee; and the sooner "it is done the better. You would get the particulars of "the land and the value of the copyhold to be made free "from *Mr. Bracebridge*."

The report further stated the affidavit of the Solicitor, that the conveyance of the land, mentioned in the letter to be purchased from *Peters*, was delayed from *November*, 1800, till *August*, 1801, in consequence of objections taken by the purchaser of other estates, depending upon the same title; the investigation of which it was thought adviseable to wait. The Master certified, that his opinion was, that the devisees in trust can make a good title, except as to eleven acres, conveyed to the testator after the date of his will; and, it appearing by the letter of the testator, that he had purchased these eleven acres long before the date of the will, though no conveyance was made to him until after that date, the Master was of opinion, that the equitable estate passed under the will to the devisees; and the legal estate descended upon his heir at law in trust for the devisees of his will; and there-[552] fore the devisees and the heir at law, joining in the conveyance, as the Master conceived the heir might be compelled to do, could make a good title.

An exception was taken by the heir at law to the report; suggesting, that the Master ought to have found, that the testator had not when he made his will, an equitable estate in the eleven acres; the letter not containing evidence of a contract by the testator before the date of his will for the purchase under such circumstances that a Court of Equity could have enforced it, and therefore he had not at the date of his will any estate, that could pass by it.

Mr Romilly, and Mr Cullen, in support of the Exception.—There is no evidence of the alleged contract, previous to the will, except the letter of the testator to his Solicitor It is true, though formerly doubted, a letter to an agent, stating the terms of the contract, will prevent the effect of the Statute of Frauds.(a) But this letter, containing no terms, nothing as to what was purchased, or the price, mentioning only "the land" he bought from *Peters*, does not state a contract, that can take the case out of the Statute. Upon that letter a decree for a specific performance could not have been obtained.

Mr. Richards, Mr. Trower, and Mr. Martin, for the Report.—The testator took the conveyance of these eleven acres under a previous agreement; by the effect of which [553] he had the equitable interest; and might have insisted upon a performance. This letter, speaking of the title to

(a) Stat. 29 Ch. 2. c. 3. See Tawney v. Crowther, 3 Bro. C. C. 168. 318.

the land bought of *Peters*, is evidence; and may be considered as forming part of, or referring to, the subsequent deed. It is quite sufficient in a letter to refer to a paper writing not signed, which, if sufficiently explicit, will have effect as a writing within the Statute (*a*) The acknowledgement of the contract by letter is what binds the party; taking it out of the mischief, against which the Statute was directed, and the terms may be proved, or admitted by the answer. This letter, directing the Solicitor to prepare the conveyance, must mean, according to the terms of the agreement, which is stronger than the simple recognition of the contract. The Solicitor may be considered the agent both of the vendor and the vendee.

Mr. Romilly, in Reply.--The proposition is new, and contradicted by many cases, that if it appears in writing, that there was an agreement, though it does not appear what it was, that is sufficient Suppose the Solicitor could be considered the agent of both parties; of which there is no evidence or, even suppose an agreement in the terms of this letter had been signed by both parties, and had been thus expressed, "the land mentioned between us, and upon the terms mentioned between us," such an agreement could not have been executed That was decided in *Brodie* v. *St Paul*. (*b*) The mischief, against which the Statute (*a*) was directed principally, was perjury as to the terms of agreement It cannot be conceived the Legislature intended so nugatory a thing as to prevent perjury merely as to the fact of an agreement; not as to the terms It is to be lamented, that the Statute has been so much infringed. [554]

(*a*) *Forster* v *Hale*, *ante*, vol. iii. 696.

(*b*) *Ante*, vol. i. 326. In the valuable collection of cases decided by the late Lord *Chancellor* of *Ireland*, *Schoales* & *Lefroy's* Reports, page [illegible], in the case of *Clinan* v. *Cooke*, his Lordship, speaking of the case of *Brodie* v *St Paul*, as a decision upon the point, that the terms of an agreement within the Statute of Frauds cannot be supplied by parol evidence, says, "It is extremely difficult to collect that from the report of the case, for "I observe, that the reporter has omitted to state the fact, on which the "question turned he does not state the agreement, and you only discover from the argument, what was really the question between the "parties."

As that report is frequently referred to, and, except in this instance, without animadversion, it will not be thought improper to observe, that the point in the cause being, what was the agreement, and the bill being dismissed, as that could not consistently with the Statute of Frauds be ascertained, the agreement could be stated in no other way than by stating the terms, which each party insisted, as having been read upon the first meeting from the paper referred to, constituted the agreement Indeed his Lordship's account of the case from his recollection corresponds precisely with the report.

(*a*) p 554. Stat 29 *Ch* 2. c 3

1805.

ROSE
v.
CUNYNGHAME.

Where a written agreement for the purchase of an estate has been executed, the purchaser has the estate in Equity; and it will pass by his will; which will not be revoked by the subsequent conveyance of the legal estate.

The Lord CHANCELLOR.—The question is, whether in Law or Equity the testator had this land at the time he made his will. It has been long decided, that, where a written agreement for the purchase of an estate has been executed, the purchaser has the estate in Equity; and, as he has it in Equity, it will pass by his will; which will not be revoked by the subsequent conveyance of the legal *estate.(a) But that decision has always gone upon this, that the party has it in Equity by the force of the contract. The ground upon which this case is put, is, not that he had the estate, but, that this letter is evidence, upon which a specific performance could be compelled, and, that letter being previous to the will, it is alleged, that therefore he had the estate in Equity. The answer to that is, that this letter does not express the terms of the agreement in such a way, that a specific performance could be compelled. It amounts to no more than that there was a parol agreement upon some terms, admitting that, but leaving altogether to parol evidence to say, what the terms were, and therefore, what the agreement was. The will was made immediately afterwards. Suppose the testator had died the day afterwards, could his heir have claimed this land by descent? The vendor might have said he should not have it. The executor might have refused to pay for it. If the heir could not have claimed in that case, the reason must be, that it was not the estate of the ancestor If that is so, how can the devisee claim the estate, as having been his? The possibility, that the executor may pay for it, is nothing, as then it would be his only by the voluntary accession of the representative. But it does not rest there. Could *Peters*, or, if he had died at that moment, could his heir, have been compelled to convey? They could not have been compelled. The testator neither had the estate in Equity, nor could call for it. The subsequent conveyance, therefore, is the instrument, by which the estate became his; and, that being subsequent to his will, the estate did not pass by it.

[*555]

Therefore allow the exception.

(a) *Doe* v. *Pott*, *Doug.* 684. *Watts* v. *Fullarton*, cited *Doug.* 691.

1805.

OGLE'S CASE.

MR. ROMILLY moved, that a Bankrupt should be discharged from an arrest and detainers lodged against him; as having been arrested in *London* in his way from *Bath* to *Liverpool*, for the purpose of examination before the Commissioners, observing, that a petition is not necessary for this purpose.

Bankrupt on motion in the Bankruptcy discharged from an arrest and detainers; as having been arrested on his way, though with a deviation, *bonâ fide* for the purpose of examination before the Commissioners.

Mr. Wetherell, for the Plaintiff in the Action, opposed the Motion: suggesting, that the Bankrupt was in *London* for other purposes distinct from his Bankruptcy.

The Lord CHANCELLOR agreed, that a petition was not necessary, referring to *Aylett's* case, before Lord *Thurlow*, in which the application was *vivâ voce* in Court. (a) His Lordship observing, that the right to the discharge depended on the point, whether the Bankrupt was *bonâ fide* on the way to his examination, upon the affidavits made the order, that the creditor, who had arrested him, should discharge him: and, that all parties, who had lodged detainers against him, or who should lodge detainers against him, before he should be discharged from that arrest, should discharge him from those detainers; and, that service at the last place of abode should be good service.

The order was taken by the *Register*: but upon *Mr. Romilly*'s suggestion, that it ought to be in the Bankruptcy, The Lord *Chancellor* said, it would be safer to make it in Bankruptcy, and made the order accordingly. (a) [557]

(a) *Ex parte King, ante*, vol. vii. 312.

(a) p. 557. *Salgues v. Birch, ante*, vol. ix. 64. *Ex parte King, Ex parte Donkey, ante*, vol. vii. 312. 317.

Ex parte BERNAL.

Nov. 9. 12. 23.

THIS petition prayed, that the examination of a Bankrupt under a Commission, which had been superseded, may be produced at the hearing of a suit in the Court of Chancery in *Ireland*.

The Attorney-General, Mr. Piggott, Mr. Romilly, and Mr. Hart, in support of the Petition.—Admitting, that

The proceedings under a Commission of Bankruptcy, superseded, ordered to be produced at the hearing of a cause in the Court of Chancery in *Ireland*, with a view to evidence from the Bankrupt's examination. But not of course

1805. Ex parte BARN[illegible]

this discovery is compelled by the Law, why, being made, should it not be used in a civil suit? It is not obtained under pain of death. The only penalty, under which the Bankrupt submits to examination, is the penalty of perjury, if he swears falsely: but that peril ought not to weigh, where the examination is to be used in a civil suit between subject and subject. Examinations, that are refused in criminal cases, are received in civil suits. Thus a man, under examination before a Magistrate, is not bound to make a discovery: but, if he does, that declaration may be given in evidence in a civil action, always confining it to civil cases. Is it not better, that the Bankrupt should be compelled to pay a fictitious debt upon his own confession, than that a creditor should by being deprived of the benefit of his confession lose an honest debt? Suppose the Bankrupt might have demur- [558] red to a question, even as the answer might forfeit his life: he ought to have demurred, and, having waived that advantage, is now too late in the objection. If this confession had been made in a suit in Chancery, this application would have been of course; and the proceedings in Bankruptcy are as much in your Lordship's custody as the proceedings in a cause in the Court of Chancery are in the custody of The Lord *Chancellor*. The circumstance, that the Commission has been superseded, does not make any difference.

Mr. Fonblanque, for the Bankrupt, opposed the Petition.

The Lord CHANCELLOR.—It struck me, that this petition, for an order to have the proceedings under this Commission of Bankruptcy produced at the hearing of a cause in the Court of Chancery in *Ireland*, was new, as an application of course. I recollected requests of a similar nature made to my predecessors, perhaps not in a very formal way; but I had no recollection, that such a request had been granted. When the application was made in the vacation, it occurred to me, that it might be right in the particular case to direct such a production: but recollecting the situation of the party in Bankruptcy, and the purpose, for which it was asked, I had doubts, whether it ought to be granted of course; or, whether so much of the nature of the case ought not to be disclosed as would show, that the application was not to gratify curiosity, or with a worse motive, but for purposes of substantial justice, the execution of which with reference to all the circumstances made it fit, that such a production should be made. I was afterwards informed, there had been a case, in which such an application had [559] been granted of course by *The Master of the Rolls*. But I cannot look upon that case as a considerable authority.

First, I doubt, whether *The Master of the Rolls* would have made that order, if the subject had been explained. Where the papers are of record in another Court of Justice, this Court says, if they would be evidence, they shall be used at the hearing, saving all just exceptions: but in that instance the determination is upon the production in this Court of papers, for which the party can apply to the other Court *de jure*. Whether the party can apply any where to have papers in Bankruptcy produced, it cannot be said, that *The Master of the Rolls* can make such an order There is considerable question, how far this can be received in evidence, attending to the circumstance, that the Bankrupt is called upon to pass his examination, and further, that the Commission has been superseded.

1805. *Ex parte* Br[illegible]. Papers of record in another Court of Justice, used at the hearing of a cause in the Court of Chancery, saving just exceptions.

The order for producing the proceedings at the hearing of the cause in *Ireland* was made.

Nov. 2[illegible]

Ex parte MINOR

June 20 *Nov* 15 28.

UPON the 27th of *August*, 1804, the *King's Head* Inn, and other premises, in *Pershore*, part of the estate of a lunatic, were sold before the Master. Under a petition, presented by this petitioner, upon the 28th of *November*, the biddings were opened, and the petitioner was reported the best bidder at the re-sale, which took place upon the 9th of *February*, 1805, at the price of 720*l* On the 26th of *February* he presented a petition, that the report might be confirmed, &c On * the 28th of *February*, before any order made upon that petition, a barn and stable, part of the premises comprised in the lot sold, were destroyed by fire, not having been insured. The purchaser presented a petition to have the value of the premises destroyed ascertained, and the amount deducted from the purchase-money.

A purchase before the Master is not complete before confirmation of the report. Therefore a loss by fire after the report, but before confirmation, falls upon the vendor, and the circumstance, that the sale had been delayed by the purchaser having opened the biddings, was not attended to

Mr. Dowdeswell, in support of the Petition.—It is necessary to distinguish this case from *Paine* v. *Mellor* (a) That was decided upon the ground, that from the date of the contract the purchaser was in Equity the absolute owner to all intents and purposes of the premises purchased. But a sale before the Master is not the same as

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(b) *Ante*, vol vi. 349.

1805. Ex parte Mason.

other sales in the common way, by private contract or by auction, in that respect. Before the Master the highest bidder cannot be considered the owner to all intents and purposes until the confirmation of the report. If the premises were in the interval increased by accident, as if a mine had been discovered, your Lordship would require him to increase the price. *Ex parte Manning.*(b) *Dacy* v. *Barber.*(c) *Blount* v. *Blount.*(d)

Mr. Thomson, for the Committee.—In the last case mentioned, there must be some mistake as to the *dictum*, that the Court regards only the time of the execution of the conveyances; which was not the point before the Court. This is a very unfavourable case for this application: this purchase being made upon opening biddings; putting aside the former purchaser, upon an advance of 70*l*. Upon what principle, referring to all the legal and equitable consequences, attaching upon sales, can the Court distinguish sales before the Master from sales in any other way? From the time when the purchaser signs the Master's book, and has a report declaring him the purchaser, all those consequences must attach upon him. If he dies soon afterwards, the sales may be enforced against his representative, and the estate would in this Court be considered real estate: and go to his heir, if he had not disposed of it, as he might do in his life, or by will. If a benefit had accrued, the vendor could not claim it. The cases in common sales are very hard, and a prodigious advantage has been gained by the purchaser in consequence of the event: *White* v. *Nutt.*(a) *Mortimer* v. *Capper.*(b) *Jackson* v. *Lever.*(c) In *Mortimer* v. *Capper* no payment had been made, and yet the principle, that from the date of the contract the estate belonged to the purchaser, and the money was the property of the vendor, prevailed, and the vendor got nothing. It is true, there is this peculiarity in a sale before the Master, that, until the report is confirmed, the purchaser is not quite sure of his purchase, though he is always bound from the time of the contract; and he cannot refuse to complete his contract, if he finds it not to his advantage. In that respect it is anomalous.

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The Lord CHANCELLOR.—The question must depend upon the point, what is the date and time of the contract, at which it can be said to have been complete. Is the bidding in the Master's office the contract between the Court and the bidder, or only an authority to the Master to tell the Court, that if the Court approves, the

(b) 2 *P. Will.* 410. (c) 2 *Atk.* 489. (d) 3 *Atk.* 636.
(a) p. 561. 1 *P. Will.* 61. (b) 1 *Bro. C. C.* 156. (c) 3 *Bro. C. C.* 605.

Court may make * a contract with him upon the terms proposed? Let the Master certify to me, what were the conditions of sale; and what has been the deterioration in value by the fire; and reserve the question; for, though the sum is not large, the question is one of the most considerable that has occurred for some time. In some of the cases that have been cited, the change of property is said to be from the date of the report: in others from the time of the conveyance: so, that, though confirmed as the best purchaser, if he had not got the conveyance, he would have been entitled to say, the estate was not his. That cannot be according to the principle. Suppose this person had insured the premises, while in the Master's office, from fire: would he according to the cases in late times have had an insurable interest? His interest is not near so thin as many that have been considered insurable.(a)

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Ex parte MINOR.

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The Master's report having ascertained the deterioration in value of the premises in consequence of the fire at 75*l.* 16*s.* another petition was presented to have that sum deducted from the purchase-money.

Nov. 15.

The Lord CHANCELLOR stopped *Mr. Romilly* and *Mr. Dowdeswell*, in support of the petition, declaring his opinion, that the loss occasioned by the fire must fall upon the vendor, and made the order accordingly, with costs. On a subsequent day his Lordship said, that, since he made the decision, he found it confirmed by what Lord *Hardwicke* says in *The Attorney-General* v. *Day*,(b) as to carrying a purchase into execution against the representative, after the report is confirmed.

Nov. 28.

(a) *Edie* v. [illegible], cited ante, vol. vii. 602. Vol. x. [illegible]

(b) 1 Ves. 218. See pag. [illegible]

1805.

November 26.

THE ATTORNEY-GENERAL v. VIGOR.

Receivers and Committees not to apply the trust fund in repairs to any considerable extent without a previous application.

Upon a receiver's application to be allowed for repairs done, an inquiry was directed whether the repairs were reasonable.

MR. FRERE moved, that a receiver may be allowed for necessary repairs that had been done.

The Lord CHANCELLOR granted a reference to the Master, to inquire, whether the repairs were reasonable; with liberty to apply. His Lordship observed, that the Court was not in the habit of permitting receivers and Committees to apply the trust fund in repairs to any considerable extent without a previous application.(a)

(a) See *Ex parte Marton*; *Ex parte Hilbert*, ante, 397.

November 28.

TAPPEN v. NORMAN.

Order, that the name of an infant Plaintiff may be struck out, that he may be made a Defendant.

An infant Defendant, abroad, cannot have a guardian assigned, to put in his answer, on motion, but a Commission must go.

MR. THOMSON moved, that the name of an infant Plaintiff may be struck out, that he may be made a Defendant,(b) and that his mother may put in his answer, as guardian, without an appointment in the usual way: observing, that the latter part of the motion was new; but, the infant being abroad, could not be brought into Court for the purpose of having a guardian appointed; and the proceeding was for his benefit, in order to take care of his interest, and, if it cannot be done in this way, there must be a Commission.

[* 564] * *The Lord* CHANCELLOR asked, if there was any instance of this, and, the *Register* answering, that there was no instance, said, a Commission must go.

(b) *Lloyd v. Makeam*, ante, vol. vi. 145.

1805.

SMITH v. ALTHUS.

December ...

A MOTION was made, that the Master may be directed to receive evidence, which he had refused.

Mr. Romilly, in support of the Motion, said, a notion had got into the Master's office, that they could only receive evidence that was read at the hearing, which could not be correct: that *Haugh* v. *Williams*, (a) *Sandford* v. *Paul*, (b) and *Browning* v. *Barton*, (c) were all upon application to examine the same witness; but there was no instance of an application to examine another person.

Evidence in the cause, though not read at the hearing, may be received by the Master.

Witnesses, examined in the cause, cannot be examined before the Master without leave of the Court: but other persons may, and to the same points.

The Lord CHANCELLOR.—The danger of permitting further examination applies only to re-examination before a decree, not to examination before the Master afterwards, the object in directing the inquiry being to obtain further evidence. The Master's opinion, if founded in principle, must produce this consequence, that, where the Court sees upon the evidence ground for further inquiry upon a fact, the evidence before the Court cannot be read before the Master, unless it has been actually entered. Where the Court direct inquiry into a fact, it is in the nature of a new issue joined, and what would be evidence in any other case will be evidence before the Master. My opinion is, that, if the matter, deposed to in the cause, has really the character of evidence upon the matter directed by the decree to be inquired into, it may be received in evidence before the Master. As to the examination before the Master of those witnesses, who were examined in the cause, there must be an application for leave to examine them: but as to persons who were not witnesses in the cause, they may be examined before the Master to the same points. [565]

(a) 3 *Bro. C. C.* 190. (b) 3 *Bro. C. C.* 370. (c) 2 *Dick.* 708.

1805.

Dec 11, 12

NORRIS v. KENNEDY.

Plaintiff, entitled to an injunction, on affidavit, as, to stay proceedings at law by a party abroad, must state the whole of his case within his knowledge upon the original bill, and cannot after answer, upon which he neither moved nor excepted, have the injunction upon amendment and affidavit, as a general rule, subject to exception, as circumstances, come to his knowledge subsequently surprise, &c

[*566

JOHN and *Angus Kennedy* carried on business in partnership: *John* residing in *London*, and *Angus* in *Jamaica*. Goods were consigned to them by *Barclay* and *Norris*, of *Manchester*, for the purpose of sale in the *West Indies*. In 1802 an action was brought by the *Kennedys* for a sum, claimed by them to be due upon the balance of accounts. In 1803 a bill was filed by *Norris*, the surviving partner of *Barclay*: charging the *Kennedys* with fraud, by representing the produce of the sales to be much lower than their actual amount, stating, that a balance was due to the Plaintiff, and praying an injunction. To that bill *John Kennedy* put in an answer in *November*, 1803, *Angus* in *May*, 1805, insisting, that the account, rendered by the Defendants of the produce of the sales was just. No exception was taken to either answer: nor was any motion made for an injunction. but. after the answer of *Angus Kennedy* came in, the bill was amended; stating a new case, with reference to bills, that had been drawn in part payment *of the consignments, and renewed from time to time; and upon that amended bill a motion was made for an injunction, supported by affidavit. *John Kennedy* had become a Bankrupt, and went abroad about two years after his answer came in

Mr Romilly, and Mr Bell, for the Plaintiff, moved for the injunction, distinguishing this case upon the circumstance, that the Defendants being abroad, the motion must be made upon affidavit, and, in order to account for not having brought forward the subject of the amendments sooner, said, the discovery was not obtained until the answer of *Angus Kennedy* came in, who alone could give an account of the sales, the answer of *John* being only upon information from the other, and that, before the answer of *Angus Kennedy* was obtained, the Plaintiff did not know the Defendants meant to go into the bill transactions, and to insist upon a balance as due to them upon the whole.

Mr. Richards, and Mr. Wetherell, for the Defendants.—This is an application, against the general course of practice, for an injunction upon an amended bill: no new fact being brought forward, which the parties did not know when the original bill was filed, a considerable time ago; praying an injunction, which was never obtained; to which bill full answers were put in. The Court of *Exchequer* held, in opposition to Lord *Thurlow*, that the Plaintiff must upon affidavit account for not putting all his case upon the original bill: otherwise injunctions

would be got from time to time by amendment; and great inconvenience would be produced, as, if the new matter had been introduced in the original bill, the answers would have been in. The Plaintiff * has no right to read any affidavit, except to explain, why all the facts, that are material, were not introduced in the original bill. The object of that bill was to charge the Defendants with a fraud in the sale of the consignments in the *West Indies*. To that bill full answers were put in. Why was not the subject of these amendments made matter of the original bill: no new fact having come to light, requiring any new discovery? The subject of these amendments is a detail of bill transactions between the houses, which ought either to have been the subject of the original bill, or should have been brought forward by amendment two years ago.

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The Lord CHANCELLOR.—The rule is, that where a party is abroad, and you want an injunction against his proceeding at Law, in a certain stage you get it upon affidavit. The necessity for having that was not originally acknowledged here, but was adopted from the Court of *Exchequer*. It has been stated correctly by *Mr. Richards*, that, where an amended bill has been filed under such circumstances as these, Lord *Thurlow*'s opinion was, that, if it brought forward new matter which would be a ground for an injunction, an injunction should go. That has been considered by the Court of *Exchequer*, and the rule there, as a general rule, seems to me the better rule; for, if a party, knowing all that is in dispute, does not put the whole case within his knowledge upon the record, particularly where the Defendant is abroad which necessarily leads to delay, and the Defendant puts in a full answer to that bill, it would be very dangerous to hold, that, after so much time as must elapse in that case, the Plaintiff shall be at liberty to put upon the record by amendment [*568] what he might have put upon it originally, and which, if he had done so, would have produced an answer before that time; and, an injunction being a dilatory proceeding, it is safest, as a general rule, to say, that it shall not be done. Certainly very special circumstances may form an exception to that, as to every general rule.

This is the case of an action brought by *John Kennedy*, being in this country, in the name of himself and *Angus Kennedy*. The conduct of *Angus Kennedy* was therefore in the hands of *John*; who puts in an answer; which upon the practice of the Court I must take to be full; as the bill stood originally. It is alleged, that the answer introduced new matter, not merely relative to the consignments in dispute by the original record, suggesting ques-

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tions with regard to the bill account with *John Kennedy* If *John Kennedy* had been the only Defendant, to have made this a case of exception, the Plaintiff's amendment ought to have been prompt, and his affidavit immediate. I lay the Bankruptcy out of the question; for the Defendants, being identified in the action, must be considered identified in this suit: therefore the Plaintiff cannot be said to have had an answer until he had the answer of both. The question then is, both those answers being full, do they furnish a case of exception to that, which, as a general rule, is proper? Frequently, though the answer is full, a new species of case may make it necessary to amend. If the Plaintiff had no reason, when he filed the original bill, to suppose, that the bill account was in dispute, but was led to imagine, the contest related only to the consignments, and the answers, considered as one answer, bring forward that other article by surprise, and, if the answer of *Angus*, being abroad, was not as satis- [569] factory as that of *John* upon that head, it would form a case of exception. It depends therefore only upon the fact At present my opinion is, that the injunction ought to go. but I will read the bill and answer.

Dec. 12

The Lord CHANCELLOR.—This is a bill for an injunction to stay proceedings at Law An answer was put in by one Defendant, and, after a considerable time. by the other, who was abroad No exception was taken to either answer: nor did the Plaintiff move for an injunction upon the merits The answers therefore must be considered, according to the practice of the Court, full to the case put originally upon the bill The Plaintiff then amends, and upon that amended bill files an affidavit, upon which he insists he is entitled to have an injunction, in the same manner as he might have had it upon affidavit, when the original bill was filed, claiming the injunction upon the new matter in the affidavit. All fair consideration calls upon the Plaintiff, as far as he can, to state in his original bill the case, upon which he prays an injunction; for there would be no end of granting injunction with every amendment upon affidavit against a party abroad.

But taking that as the general rule, there may be cases of exception, as if circumstances come to the knowledge of the party: as to which he may give explanation, sufficient to raise a case of exception; and the true question upon this motion is, whether the circumstances, disclosed in this affidavit, form a ground, distinctly stated, to induce the Court to depart from the general rule. This affida- [570] vit will not do: leaving the new matter, now charged by

the amended and supplemental bill unexplained; and not disclosing, for what reason that new matter was not brought upon the record at an earlier period. Upon reading these papers I am convinced, I cannot without great danger to the rules of the Court grant this motion.

1805. Norris v. Kennedy

Injunction refused.

PARTRIDGE v. HAYCRAFT.

February 28. *June* 14. *December* 19.

Plaintiff, having obtained the usual order to amend, and that the Defendant shall answer amendments and exceptions together, cannot take a new exception as to any thing in the original bill, but must go before the Master upon the old exceptions, as they apply to the original bill, and upon new exceptions, as to the new matter introduced by the amendments, which however the Master may consider with reference to such parts of the original bill as apply to them

THE Defendant having submitted to exceptions, the Plaintiffs amended the bill, and obtained the usual order, that the Defendant should answer the amendments and exceptions together. When the further answer came in, the Plaintiffs again excepted, taking a new set of exceptions, extending to the original bill, as well as the amendments. The Defendant objected to that course, and insisted, that the new exceptions ought to be confined to the amendments, and that, with the reference of those exceptions, as to the original bill the answer should go back to the Master upon the original exceptions. The Master refusing to proceed upon the new exceptions, the point was brought before The Lord *Chancellor* by motion.

The bill was filed by residuary legatees against the executor, to charge him with the profits of a trade, and to set aside a release, obtained by him upon a settlement of account from all the Plaintiffs, except one, who was lately come of age.

Mr Bell, for the Plaintiffs.—* The practice, as represented by the Defendant, is, that the new exceptions ought to relate to the amendments only, not to the amended bill. No case or rule of practice is to be found properly applicable to this point. If it is considered upon principle, there can be no justice in the course upon which the Defendant insists; for, if the Master is to consider the original exceptions, referred back to him, with reference to the answer to the original bill only, he can only look at the substance of the original bill, to see, whether it is answered: but it is probable, that the original exceptions, which, considered with reference to the original bill only, might be disallowed, ought to be allowed, with reference to the amended bill. Many instances may be put, in which the case may be so varied by the amendment, that it would be impossible for the Master to observe the distinction. Suppose an answer, setting forth various deeds and writings, a general excep-

[* 571]

1805. tion, that the Defendant has not set forth all the deeds and writings, relating to the matter in question, and an amended bill, stating other writings particularly: the answer might be full to the original, and not to the amended bill. Suppose, after exceptions allowed, or the Defendant submitting to answer, the bill is amended by introducing new facts, which satisfy the Master and the Court, that the party cannot insist upon notice by way of defence, if that should come on upon the original matter, a denial of notice might answer those exceptions: but if those exceptions were to be argued upon the matter, introduced by the amendments, they would hold. In the case of a parol agreement, denied, and another agreement, introduced by amendment, admitted, which would give the Plaintiff a right to inquire into the particulars, charged by the original bill, this consequence would follow, that the Defendant might put in an answer admitting that agreement, but not any of the facts connected with it.

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Mr. Cooke, for the Defendant.—The question is merely, whether the Plaintiffs are entitled to file new exceptions as to the old matter. It is settled, that no new exceptions can be added: *Prac. Alm.* 10, followed by all the books of practice. The course is, if the bill is amended, and the amendments are not answered, the answer is referred upon the old exceptions, and new exceptions are taken upon the amendments. But these Plaintiffs have taken new exceptions upon the original, as well as the amended, matter. The two modes of proceeding are laid down in *Harne's Practice and Costs*. The effect of this course would be very prejudicial to the Defendant, who, answering exceptions and amendments, never attends to any parts of the original bill, but those, to which the exceptions apply, concluding, that the Plaintiff is satisfied with the answer as to the rest; and, if the Plaintiff is at liberty to add a new exception, the answer might not be full; and the Counsel would not have the opportunity of determining upon the propriety of submitting. The only case to be found upon this is *Adams* v *Campbell*; (a) in which, after exceptions submitted to, and an order for liberty to amend, a new exception was taken to a part of the first answer only, that was not excepted to before; and the question, whether a new exception could be added, was given up. Upon principle, why is the Plaintiff, because he amends, to have a right to do that which he could not possibly do, if he had not amended? He could

[573] not add a new exception, because the Defendant had not

(a) 13th Dec. 1792. *Mr Cooke* cited this case from his own MS Note, observing, that he could not find any trace of it in the Register's Book.

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answered the original bill; why then is he, because he has amended, to have the advantage of an opportunity to take a further exception to the original answer? As to the case of a new agreement, introduced by amendment, it is not clear, that the denial of an agreement would prevent the Plaintiff from calling for an answer as to all the other circumstance in the bill: (a) but, supposing it would, if the Plaintiff only inserts a charge of the new agreement, that is not the fault of the Defendant, for the Plaintiff may by amending the other parts of the bill compel the Defendant to give answer to those charges, which, having denied the agreement, he was not before bound to answer. Then, as to the case of deeds and writings, if there are any, which were supposed not to be in the possession of the Defendant, or to be immaterial, why may not the Plaintiff state by the amendment the circumstances, that show, they are become material, which would make it new matter, that must be answered? There is no reason therefore upon principle for adopting a different course, where the Plaintiff has amended his bill, from the clear, settled, practice, if there is no amendment, that there can be no new exception without special leave of the Court.

Mr. Bell in Reply — I do not dispute, that after exceptions taken there cannot be a new exception upon the same bill, or any part of the same bill, upon which the Plaintiff might have excepted originally: but, when new matter is introduced into the bill, many parts of it remaining in the original state, yet that new matter giving the case an entirely new colour, and the complication being such, that it is impossible to divide the exception, the proper course is to take a new exception: and though some of the expressions in that exception may be found in the original bill, yet the relation is so different with reference to the new matter, that what would in the original state of the record be a sufficient answer, in the amended state, if permitted to stand, might amount to perjury, and therefore that part should be again answered with reference to the new, combined with the original, matter. The old exceptions certainly may be referred back; but the Plaintiff may also insert such parts of the old exceptions as he chooses, and also the new matter; where the parts of the original and amended bills are so complicated, that it is impossible to separate them. There

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(a) See the cases that have occurred since this argument: *Dolder* v. *Lord Huntingfield*, *Fauldler* v. *Stuart*, and *Shaw* v. *Chang*, *ante*, 283, 296, 303; which leave still unsettled the general question, whether a Defendant can by way of answer decline to make a full answer. {See the note, however, to *Dolder* v. *Lord Huntingfeld*, and the *American* cases there cited.}

1805. Partridge v. Haycraft.

is great convenience in that. *Pratt* v. *Tessier* (a) seems to be an instance, in which new exceptions were taken upon amendments, connected with the original allegations. I admit, the new exceptions must be sanctioned directly or indirectly by the amendments: otherwise the Plaintiff, though he may refer back the old exceptions, cannot take new and different exceptions to the answer, as he ought to have taken all his exceptions at once.

Formerly a bill contained little more than the statement.

The Lord CHANCELLOR.—Formerly the bill contained very little more than the stating part. I have seen such a bill; with a simple prayer, that the Defendant may answer all the matters aforesaid, and then the prayer for relief. I believe, the interrogating part had its birth before the charging part. Lord *Kenyon* never would put in the charging part; which does little more than unfold and enlarge the statement. Upon *Pratt* v. *Tessier* (a) my doubt would have been, whether those exceptions should have been proceeded upon at all. I take this to be the practice, that, if exceptions are taken, and the answer is insufficient, and, the Plaintiff not moving to amend, and the Defendant answers the exceptions, when that answer comes in, the Plaintiff cannot add to the number of the old exceptions, but, if not satisfied, must contest with the Defendant, whether he has answered the old exceptions. It is usual, and even necessary, to refer the answer back upon the old exceptions. But the Plaintiff has a right, if he is in time, to move to amend, and that the amendments and exceptions shall be answered together; and, that having been done in this instance, this question arises for the first time, with the exception of *Adams* v. *Campbell*.

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After answer upon exceptions Plaintiff cannot add to his exceptions, but may refer the answer back upon them.

Where the case is merely the old bill, left, as it was, unaltered, with a great many allegations introduced by amendment, substantive, independent, allegations, the sensible rule is, that, the old allegations being neither in form, nor in substance and effect, touched by the new matter, a new exception should be taken, not as to the old matter, but as to the amendments. The difficulty arises from this; that by the variation of a few words in the old charge, the sense may be made perfectly different; and if that is a new charge, it must be excepted to, as such. It has frequently happened, that eight or ten exceptions have been disallowed, upon the ground, that they were immaterial; and yet there was one charge in the bill, preceding those ten charges, to which single charge an exception applied, and in answer to that first charge, the fact being admitted, the admission of that

(a) 1 *Bro. C. C.* 39. (a) p. 575. 1 *Bro. C. C.* 39.

fact changed the subsequent ten charges as to the relevancy, and called upon the Court to give a judgment directly contrary as to the other ten. Thus, if the Plaintiff's merits depended upon the point, whether a fact had taken place within ten years, and ten exceptions were held immaterial, as that did not appear, an allegation, that the fact has been done within ten years, might be introduced in the amended bill, and then, if the old exceptions were not construed with reference to the answer to the amended bill, that answer could not be connected with the matter of the ten exceptions, so as to found new exceptions upon them. 1805. PARTRIDGE v. HAYCRAFT.

This motion, having stood for judgment a considerable time, was ordered by *The Lord Chancellor* to be mentioned on the first day of *Trinity* Term, when *The Master of the Rolls* would be in Court, and was accordingly argued again on that day before his Lordship and *The Master of the Rolls*. June 11.

The Lord CHANCELLOR.—When this motion was argued before me, I had no recollection of a similar case. With the exception of the case,(a) alluded to by *Mr. Cooke*, which I take to be an authentic note of a proceeding in a cause, no case was referred to. The books are almost silent upon it. The information I could obtain amounted to nothing; and I had considerable difficulty upon reasoning it in my own mind. I therefore took the opportunity of having it mentioned this day, in order to avail myself of the assistance of *The Master of the Rolls*.

Where the bill is not amended, the course is clear. [577] When the answer comes in, the Plaintiff is to determine, whether it is sufficient, or not: if he treats it as not sufficient, he determines at his own risk, in what points he shall take exceptions, and then the Defendant must consider, whether he has sufficiently answered as to all, or any, and which, of those points, and may submit to answer all, or some, and not the rest of them; or may argue the question upon the sufficiency of the answer, first, before the Master, afterwards before the Court. When the judgment of the Court is had upon the sufficiency of the answer as to all the points, to which the exceptions go, the Defendant must put in a further answer, if the first is insufficient, and, when the Plaintiff conceives he has got as much discovery as he wants, and does not amend, but waits until a second answer is put

(a) *Adams* v. *Campbell*, 1792.

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in, the course then is, that, if the Plaintiff conceives that second answer is insufficient, the question of insufficiency is tried upon the first exceptions; and the Plaintiff cannot add to those exceptions; in order to try, whether he can put himself in as good a case by an additional exception as if he had taken it originally. When the Plaintiff has a second insufficient answer the course is the same.

There is another course of proceeding, which makes a great impression upon my mind. When an insufficient answer is put in, frequently, though insufficient as to many points, it gives new lights to the Plaintiff; enabling him to see that the bill requires amendment, as well as a sufficient answer: or he may otherwise discover that. He then applies for liberty to amend, and, that the Defendant may answer the amendments and exceptions together, which order is made, and the Defendant's act in obedience to that order introduces the question, whether he has answered the exceptions and amendments together. Of necessity, the terms of the reference to the Master must be adapted to that inquiry, and the Master must be directed to look into the exceptions and amendments, and to give his judgment, whether the amendments are answered, and whether the exceptions are answered. To enable him to do so he must look into them, and for that purpose there must be exceptions, founded upon the amendments: asserting that the Defendant has not answered the amendments. The exceptions to the amended and, to the original bills are distinct subjects, as to which he is to inquire. If the Defendant's Counsel, hearing the Plaintiff's motion for liberty to amend, and that the Defendant may answer the amendments and exceptions together, prepares the answer to the exceptions, before the order for liberty to amend is drawn up, that is regular practice, as I remember Lord *Thurlow* held. Upon that it is clear, the meaning of the order is, that the Defendant is to answer those exceptions. (1)

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After motion to amend the bill, and that amendments and exceptions shall be answered together, if the exceptions are answered, before the order is drawn up, it is regular.

I was struck with the case of a bill for specific performance of an agreement, amended. In a modern instance of a bill of that kind the Defendant having by his answer denied the agreement, and stated another agreement, which he admitted, the Plaintiff by amendment struck out the agreement he had stated originally, and adopted the other; and prayed a performance of that. Suppose an agreement, or a *modus*, stated in a bill, with some little variation of circumstances, which would be fatal at the hearing: but that being discovered, the bill was amended: how are you to treat the answer, already

{(1) See *Lo[illegible]e* v. *Graham*, 4 John. Cha. Rep 170.}

put in, denying the agreement or *modus*, as originally stated, and answering all the rest of the charging and interrogating part, understood as applying to the original statement, and having no application to that, introduced by the amendment, as to which therefore it would be very unconscientious to bind the Defendant by that answer. The question seems to rest here; whether, if the Plaintiff chooses to move for liberty to amend, and that the amendments and exceptions shall be answered together, he is not bound as to the form of the reference, that is to go to the Master. I incline to think, that he is; and, that the Master must see, whether the old exceptions are answered, and, whether the amendments are answered.

1805. Partridge v. Haycraft. [*579]

I was struck with many of the cases, that have been supposed. The question is new, when it is put thus: that the matter of the amendment is such as to alter the true meaning of every passage in the bill from that, which was the meaning, when the original answer was put in: whether it is better to hold, that the Master is to look into the old exceptions, to see, whether the answer is sufficient, and into the exceptions to the answer *to* the amended bill, to see, whether those exceptions include what ought to have been taken as exceptions originally: and whether the Court will trust the Master with a discretion to determine, which were not necessary to be taken as exceptions originally, but became necessary by the amendment: or, whether it is better to say, that, if the Plaintiff moves to amend, that is something of an undertaking, that his amendment shall be so far consistent with the original case, that he shall be bound by the case, as it stands upon the exceptions, taken to the answer to the original bill. Suppose, the bill suggests a partnership between *A.* and *B.* calling for books and papers; and an amendment, stating a partnership of *A. B.* and *C.*, an exception as to the books and papers, relating to the said partnership, may be considered applicable to the partnership of the three: but then it must be an exception to the answer to the amended bill. The question, independent of practice, in good sense, is, whether the rule, that you shall not add to the exceptions to the old answer, ought not to be sacred: but, if the amended bill *bonâ fide* introduces a new case, and the exception goes really to the matter of the amended bill, whether that should not do. [580]

The Master of the Rolls.—As I have not before considered this subject, and have heard it now discussed for the first time, my opinion can be of very little weight. The question is reduced to a narrow compass, the Coun-

1805. sel on both sides agreeing as to the general practice: for the Plaintiff admitting, that, if exceptions can be taken

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to the answer to the original bill, no new exception can be added: but supposing a case, in which the introduction of circumstances by amendment may vary the quality and colour of the facts in the original bill, so that it may be impossible to separate and distinguish them, and to say, a fact has received a sufficient answer by the first answer, or by the second answer, and it remains therefore in its new state unanswered. How can that be brought before the Master but by new exception? As amendment, it might be answered by the second answer: but as to a fact, taken from the original bill, and coupled with the other circumstances, introduced by the amendment, it might not be answered. Inquiry therefore is necessary, whether that is the case. If that is not the state of the exception, there is no reason for departing from the practice: as it is admitted for the Plaintiff that he must make that good, before he has a case. If that is really the case, it would be very hard to say, there is no possible mode, in which such an exception can be taken.

[581] *The Lord* CHANCELLOR then suggested, whether there ought not to be an application for leave of the Court; and the motion stood for judgment.

December 19. *The Lord* CHANCELLOR.—*The Master of the Rolls* has stated to me his opinion after great consideration and much investigation, in which opinion I agree, that, where an original bill has been filed, and exceptions have been taken to the answer, and the Plaintiff moves to amend, if he goes upon the answer to the original and amended bill, as insufficient, he must go before the Master upon the old exceptions, as they apply to the original bill, and upon new exceptions as to the new matter, introduced by the amendments, and the utmost he can have is the Master's judgment upon the answer to the amendments with reference to such parts of the original bill as apply to them. If the original words apply to the amendments, the Master, considering, whether the answer is sufficient as to the amendments, must take into his consideration every thing in the amended bill, that gives a construction to the amendments.

1805.

MOSLEY *v.* WARD.

[illegible] 10

Executor, in trust for infants, unnecessarily calling in the property, out upon good security at 5 per cent. except a small part, keeping large balances in his hands, and using it as his own charged with interest at 5l. per cent. and costs (1)

ONE question in this cause arose upon a claim of interest against an executor in trust for infants, upon the Master's report, stating his conduct, without any purpose on account of the trust calling in the property, out upon good securities, keeping large balances in his hands, and treating it as his own.

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* *The Lord* CHANCELLOR.—The result of the report is, that this Defendant, as executor, trustee, and guardian, dealt with the property by calling nearly the whole of it from securities, as to the validity of which there is no imputation, and upon which it was producing interest, generally speaking, 5l. *per cent.*, and he called it in, not only for no purpose connected with the execution of the will, but for no other purpose than that of keeping the money in his own hands. It was treated by him as part of his own general funds. It is not traced through him to other persons, so that those persons can be charged; and he is only a simple contract creditor of those to whom he lent the money, and not entitled to call for interest from them. The balances in his hands have been increasing generally; but they never decreased so far, that he had not always a large balance in his hands unproductive. He must therefore be charged with interest upon the yearly balances in his hands.

As to the rate of interest, the Court does not usually give more than 4l. *per cent.*, where the money has been called in for the purposes of the will, and the balance only has been in his hands. But, this executor having called it in without any purposes connected with the trust, and holding the whole in his hands without attempting to lay it out, the Court has the power to give 5l. *per cent.*, and he ought to be charged at that rate. General dereliction of duty upon his part is the principle; and a small part carrying 4½l. *per cent.* cannot make a difference.

Where such general dereliction of duty obliges the Court to charge interest upon balances in the hands of an executor, as a specific demand, the same principle calls upon the Court to compel him to make it good to the infants in point of costs (a). [583]

(a) *Rocke* v. *Hart*, ante, 58.

{(1) See the note to *Piety* v. *Stace*, ante, vol. iv. p. 620, and *Dunscomb* v. *Dunscomb*, 1 Johns. Cha. Rep. 308.}

1805.

At the Rolls June 18.

Before The Lord *Chancellor* upon appeal, *Dec* 18, 20.

Agreement for the sale of an estate, the result of a correspondence by letters, good within the Statute of Frauds.

Effect of admission by answer of letters, stated by the bill; dispensing with the necessity of evidence, and therefore no objection upon the Stamp Acts.

The Defendant refusing to produce the office copy of the bill, the draft could not be read, but a specific performance was decreed upon inspection of the record.

HUDDLESTON *v.* BRISCOE.

THE bill was filed to obtain the specific performance of an agreement for the sale of an estate by the Defendant to the Plaintiff, by letters in the course of a correspondence between the Plaintiff and his Attorney and the Defendant. The first letter, written by the Defendant to the Plaintiff, dated "*Whitehaven, Wal[illegible], Nov.* 6th, 1803," began thus:

"I take this opportunity on my arrival here to acquaint "you, that my premises at *Parton* were going to be leased: "but some things have arisen to prevent it. I am not "anxious to part with the land and houses at *Parton*: "but, if I should be so disposed, shall not take less than "400*l*."

The Plaintiff sent the following answer, dated the 8th of *Nov.* 1803. "I received your letter, and consent to "give the sum you ask for your premises at *Parton*, pro-"vided you are disposed to part with them immediately. "If such should be your resolution, you have nothing to "do but to direct to me, when the money shall be paid "you, as soon as the title is completed."

In reply to that letter the Defendant wrote a letter dated the 12th of *November*, stating some particulars as [* 584] to the treaty he had been engaged in for letting the premises, that the treaty was at an end, that he had acquainted those parties with his intent to sell, and therefore considered himself under no tie in that respect. This letter contained the following passages, upon which the Plaintiff relied. "It seems you are seriously disposed to "purchase; and I am of opinion, the business will be "soon settled. Many persons have written to me with a "view to purchase, but have higgled so much on the "subject, that I could not but suppose they intended to "trifle with me - - - - - - The writings are many, "that relate to the premises at *Parton*, though a small "estate, and your Attorney may examine them, when he "thinks proper, and I will afterwards relate to you, when "necessary, how I came in possession of the estate in "question, and I think you will find every thing satisfac-"tory. I have been induced to part with this small por-"tion of my estate in *Cumberland* for the trouble I have "had." He then explains that: viz. the trouble of getting the rent on account of the distance and disputes among the tenants: and expresses a wish, that the Plaintiff would see the persons, with whom he had been treating for a lease, "to be clear as to their intentions, that "no misunderstanding may arise. - - - You will also

"discover from what I have written, that I will be at no 1805.
"expense in getting the tenants out, for at this distance
"it will be troublesome. The tenants have had notice HENDERSON
"to quit some time ago" v.
BRISCOE

By another letter, dated the 13th of *November*, the Plaintiff stated, that he agreed to purchase the estate upon the terms proposed by the Defendant in his letters. The Plaintiff's Attorney having applied for an abstract, the Defendant by another letter, dated the 23d of *November*, to the Plaintiff observed, that he does not say, he is willing to purchase the land-tax of part of the premises, which the Defendant had purchased for about 50s., and as to the writings recommended the Plaintiff to send over his Attorney to make an abstract, and desired to know the Plaintiff's determination, when convenient. [585]

By a letter dated the 1st of *December*, the Plaintiff's Attorney stated to the Defendant, that, although the Plaintiff thought, the liberal manner, in which he made the contract for the property at *Par[illegible]*, did not admit of any further demand than the 400l. yet, as the additional 50l. was so trifling, he acquiesces in the payment of it, and desires either to have the deeds or an abstract, stating, that he is authorised to remit the [illegible]l. 10s. on the title being made. By the answer to this letter, the Defendant expressed himself much displeased at it, and soon afterwards he declared, he had changed his mind as to selling to the Plaintiff and, after some further correspondence, persisting in his refusal to sell, the bill was filed.

The Defendant by his answer admitted the letters, but insisted, that they did not amount to an agreement, and that he did not intend to sell at so low a price as 400l. The cause was heard at the Rolls, when the answer was read; and, the Defendant's Counsel refusing to produce the office copy of the bill, the Plaintiff proceeded to read the letters from the draft of the bill.

Mr Fonblanque, and Mr Martin, for the Defendant, objected to that 1st, for want of an agreement stamp 2dly, insisting, that the Plaintiff ought to come prepared with a stamped office copy of the bill as in the case of depositions; being under the necessity of establishing an agreement in writing by legal evidence, though, by admissions in the answer, a parol agreement may be made out. [586]

Mr Romilly, and Mr Bell, for the Plaintiff, contended, that the Defendant having by his answer admitted the letters, the Plaintiff was entitled to read that part of his bill which stated them; as being by the admission made part of the answer. They urged, that the objection, requiring a stamped office copy of the bill, was never before

1805. made, that the Defendant, not the Plaintiff, has the office copy, and with a view to supply that by the draft, observed, that the Court acknowledges the draft of the bill by requiring the signature of Counsel to it.

HUDDLESTON v. BRISCOE.

The Master of the Rolls permitted the letters to be read from the draft of the bill, observing, upon the point of evidence, that the Stamp Laws have not made any alteration in the practice of the Court, providing, that the party cannot produce a letter or any paper writing to have the effect of an agreement, without a stamp: but there they leave it: perhaps some future Stamp-Act may make it impossible to read any thing without a stamp to prove an agreement: but this is according to the constant practice of the Court.

The Master of the Rolls, upon the merits stopped the reply, considering the agreement made out by the letters, taken altogether, and made the usual decree for a reference to the Master as to the title.

From that decree the Defendant appealed to *The Lord Chancellor*, insisting, that the Plaintiff was not entitled to [587] a performance, and further, that the evidence received was not admissible: the letters not having been produced; nor the office copy of the bill produced; nor the draft of the bill stamped; nor the record of the bill produced.

Mr. Romilly, and Mr. Bell, for the Plaintiff, in support of the Decree. As to the merits, the three first letters amount to complete agreement. The point relied on is the objection as to evidence. It is not necessary to prove what is admitted. The Counsel never signs the record: but he identifies the draft. There is no inconvenience in the course that was adopted at the Rolls. The Defendant, having the office copy in Court, has the means of correcting any mis-statement by the Plaintiff. The Court also has the record before it, and will see, that the statement is correct; for which purpose it is the business of the Defendant to produce an office copy. The Defendant, having made the admission, cannot appeal for want of proof of those facts, which are admitted. Upon an appeal from the Rolls, new evidence may be let in: *Wyatt's Prac. Reg.* 34, referring to several authorities.(a) *Wright* v. *Pilling*(b) shows the distinction between an appeal from the Rolls, which is in truth a re-hearing, and an appeal to the House of Lords. *Thomson* v. *Waller*,(c) the

(a) 1 *Vern.* 113. *Gilb. Eq. Rep.* 151. 2 *Ves.* 463. 2 *Atk.* 409. *Pre. Ch.* 196. In *Dashwood* v. *Lord Bulkeley*, *ante*, vol. x. 230, the point was not decided.

(b) *Pre. Ch.* 494.

(c) *Pre. Ch.* 295.

only case in which the contrary is supposed to have been said, does not apply; having the words "not in issue." 1805.

Hu[illegible] v. Burton

Mr. Fonblanque, and *Mr. Martin*, *for the Defendant*, *in support of the Appeal*.—* As to the agreement, there is nothing conclusive. The Defendant only states the least that he will take. The Plaintiff's answer is conditional: provided the Defendant is disposed to part with the premises immediately. A new term is afterwards added, which is never closed with, that the Plaintiff shall get the tenants out. [* 588]

As to the question of evidence, in *Ford* v. *Compton*,(*a*) your Lordship took an objection of this nature. Under a notice to produce an agreement the Plaintiff came furnished with a copy stamped. The objection was, that the original being in Court, the copy could not be read, nor could the original be read, not being stamped. In this case one objection is, that the letters themselves ought to be produced, and produced stamped. The mere draft of the bill cannot be admitted. Perhaps the record itself, with reference to the occasion, ought not to be received: the Statute requiring agreements to be stamped in order to be received. The effect of the admission in the answer is, only to relieve the party from the necessity of proving what he must otherwise prove by entering into evidence. All he gains is the power of producing the instrument, without making it evidence. The admission of passages in a will devising real estate, and of the execution, will not dispense with the necessity of producing the will, and enable the Court to give the directions, consequential upon the proof of the instrument and reading it. The objection to the draft of the bill is, that the Court has no evidence, that the record is made up from that draft. The records of the Court are supposed to be in the Court itself: the [illegible] of the clerk in Court attending, for which he has a fee, being, that he should attend with the record, that the Court might, if necessary, inspect it. The Plaintiff ought therefore to have had the record itself. [589]

The draft of the bill, offered as evidence of the contract, is immediately within the Statute,(*a*) imposing the duty in terms, which are copied into the subsequent Acts, as to agreements, "whether the same shall be only "the evidence of the contract or obligatory upon the "parties from its being a written instrument," and requires a stamp; which is not necessary to give validity to the agreement as the signature of the party. If it was only necessary to produce the record of the bill, stating a written agreement, and the admission of the answer, a

(*a*) 2 *Bro*. C. C.

589 Stat. 23 *Geo*. III. c. 58.

1805. HUDDLESTON v. BRISCOE.

written agreement would be turned into a parol agreement, and the revenue would be deprived of the stamp. If the bill had been dismissed, and the Plaintiff had appealed, and in the interim had stamped the agreement, your Lordship could not have said, *The Master of the Rolls* was wrong in rejecting evidence inadmissible at that time, though now admissible by the subsequent transaction of stamping it.

Mr. Romilly, in Reply.—The question of evidence is, whether these letters are regularly before the Court: I do not say, proved, for it was not necessary upon these pleadings to give evidence of them, not being put in issue. Evidence is not offered to show, that there was such an agreement, for that, being admitted, is not put in issue. It does not, nor can it, appear, whether these letters were stamped, or not; and upon the answer it must be taken, that they were stamped. The objection, that, not being stamped, they do not make an agreement, might have [590] been made by the answer. Consider the extent to which this is to go. As to the alleged necessity of producing the letters on account of the Revenue Laws, those Laws do not profess to make any alteration in the proceedings of Courts of Justice. They provide, that such instruments only as are stamped shall be evidence: but the instrument with the stamp is only to be produced, where it is necessary to produce it, the fact being disputed. They do not direct, that in future no admission, no concession, shall avail. Suppose an action upon a bond, and the Defendant pleads *solvit post diem*, or any other plea, except *non est factum*: it would not be necessary to produce the bond upon a stamp. So, in the case of a lost bond: a release admitted, but circumstances of fraud alleged; and many other instances may be put, on which the objection from the danger of evading the stamp would equally occur. Then, as to the draft of the bill: the answer refers to something else: making that a part of the answer. What is so referred to is neither the record, nor the draft, but the office copy of the bill, which the Defendant has in Court, and refuses to produce it, and for that reason the Court permits other evidence to be given; the Defendant having the power of showing, that the draft is not that to which he referred. The draft is offered to the Court, not as evidence, but to show what is the issue joined, and it is not even necessary for that purpose, the Court being apprised of the state of the record by the statement of the Counsel. It is necessary to inspect the record, only if there is a dispute upon that statement. At least, the Plaintiff is entitled now to produce the original record from the Six Clerk's Office. Suppose the Court had stopped the Plaintiff's case, being satisfied. If the

Court had decided, that the draft was not evidence, the Plaintiff would have produced the record, which he produces now. 1805

HUDDLESTON v. BRISCOE.

The Lord CHANCELLOR.—This decree implies the opinion of *The Master of the Rolls*, that the Defendant entered into an agreement, substantiated by admission, or by evidence, and therefore a specific performance ought to be decreed if a good title can be made. Various objections have been taken. First, that the letters do not contain any agreement, that upon the true construction they do not go beyond treaty, approaching agreement. Secondly, if they did contain the agreement they ought to be produced. Thirdly, that if they are not to be produced, and, if the Court is to proceed upon reading the answer, it cannot proceed upon that without reading the bill also, and it is insisted, that the draft of the bill could not be read, though the answer was read, but the original bill itself should be produced, and further, that, if either the draft of the bill could be read, or, if the original bill had been produced, neither the one nor the other could be read, unless having received authenticity as agreement, by having stamps imposed upon them. [591] Dec. 20

To meet the question fairly, the construction, which for the purpose of this case has been put upon the clause of the Act, (a) upon which the objection arises, is this, that, if there is a written instrument by formal articles of agreement, or a paper, within the meaning of the Statute of Frauds, (b) an acknowledgment of the terms of a bargain, those papers must have a stamp upon one or more, or all, of them. As the first question, I agree, the Court is not to decree performance, unless it can collect upon a fair interpretation of the letters, that they import a concluded agreement, that, if it rests reasonably doubtful, whether what passed was only treaty, let the progress towards the conclusion of agreement be more or less, the Court ought rather to leave the parties to Law than specifically to perform what is doubtful, as a contract. But it is also clear, that the Court is to put the same interpretation upon correspondence with reference to this subject, as other persons would, reading the correspondence fairly, with a view to collect the sense of it. Upon these letters my opinion is, that the three first letters do constitute agreement, an agreement on both sides. I use that expression; observing in a book, which will, I am persuaded, give great information to the profession upon [* 592]

No specific performance of an agreement by letters, unless upon a fair interpretation concluded: if doubtful, whether more than treaty, to be left to Law.

(a) Stat. 23 Geo. (b) Stat. 29 Ch.

1805.

HUDDLESTON v. BRISCOE.

Whether the Court will perform a contract, signed by one party, not by the other, and nothing done upon it, *Query.*

many important points of Equity, (I mean the reports of decisions by Lord *Redesdale*, (a) that Lord *Redesdale* has intimated a doubt, whether the Court would perform a contract, signed by one party; the other not having signed it, and nothing having been done upon it. I mark the circumstance, as I would not be understood to pass it by without observing, that it is not necessary to discuss that here, for these letters amount to papers signed by both. I take it rather against the Defendant in this instance; as whatever he might mean, if the fair sense is, that he means to intimate that he agrees, he cannot afterwards set up a reserve made in his own mind, especially having followed it, as he has the third letter, by another, stating a proposition about the land-tax, which he could not possibly be at liberty to write, unless he understood the bargain as concluded, upon which he had nothing more to say than to add that additional term. There is in this case therefore agreement enough if it is legitimately proved to the Court.

[593]

Whether new evidence can be produced upon an appeal from the Rolls, *Query.*

This leads to another point. It has been conceived, that I am called upon to decide this case upon evidence different from that, which was produced at the Rolls. I am not of opinion that the cases cited bear upon this in that respect; for, if the opinion given at the Rolls was wrong in admitting the evidence, the Court is in possession of the means of receiving all the evidence, that has been tendered here; and the substance of the appeal as to that I take to be no more than this, that they have a right to submit, that, if they were wrong in law, the Court ought first to have delivered what was the law, and then to have stated the consequence; and, if it was rightly contended, that the evidence should be received, the duty of *The Master of the Rolls* was, as mine is now, to say, the parties cannot go on in this way, but the habit of the Court has been to permit the letters to be produced, or the bill and answer to be stamped, if necessary. (a) This case therefore stands by itself upon that objection.

The next consideration is, whether the draft of the bill ought to have been read. As to that, undoubtedly in practice, whether upon principle, or from accommodation, it has been usual and frequent to read it. Yet upon the best consideration I cannot conceive, how strictly it can be evidence, or how it can be made so by the Defendant's refusal to produce the office copy. In the progress of a cause the Plaintiff's agent, knowing the

(a) *Schoales & Lefroy's* Reports in the Court of Chancery of *Ireland.* The case here alluded to by The Lord *Chancellor*, appears to be *Lawrence v. Butler*, page 13. See page [illegible]

(a) p. 593. *Coles v. Trecothick*, *ante*, vol. ix. 234.

bill which he files, does not take a copy: the agent of the Defendant, not knowing it, takes a copy. * But it is very difficult to assimilate that to the case in which a party has a right to read an instrument, to produce which he has no original right; but which is admitted upon the foundation, that the Defendant having the better evidence, refuses to produce it. First, it cannot be alleged, that the draft of the bill is a copy of the answer, or of the Defendant's copy of the bill, or of the bill itself; for the converse is true, that the bill ought to be a copy of the draft. It is not so always. Then how is it proved, that this is the draft of the bill? Suppose, the Court can take notice of the signature of Counsel; the result is only, that it is a paper, of which the bill ought to be a copy. But another difficulty, from analogy, follows: for the draft then is not the best evidence in the power of the party or the Court; for the Court has before it the original record, and the practice prevails, only to save the Court the trouble of inspecting the record, which must be understood to be in Court. The draft of the bill therefore ought not to have been read. But that makes no difference; for then, the record being there, and containing that, which was read from the draft, the Court must possess itself of the contents of the record; and then, reading the bill and answer together, the bill being read, as part of the answer, from the record itself, it is clear, this decree is to be sustained in that way.

1805. Hudson v. Bristow. * 594

I conceive, that in these cases, where the bill charges, that an instrument was executed, or letters passed, and the Defendant admits that, the answer is to be read precisely as if he had copied into it the agreements or letters, set forth in the bill; and it is not for the purpose of reading the bill that the Plaintiff resorts to the bill, but to read intelligibly the answer, of which by reference the bill is a part. The Defendant must therefore be understood to have admitted, as expressly as if it was stated in terms by the answer, the whole correspondence, stated in the bill. [595] That brings the case to this remaining question: if the Plaintiff can read the answer, so understood to comprehend the contents of the bill, does that dispense with the production of the letters? If it does, next, is it necessary upon this Act of Parliament to say, that answer, or that bill, considered as a part of the answer, shall be stamped? With regard to this it is clear, that, if these letters had been produced, and it appeared, they were not stamped, the Court could not have gone on, until they had been stamped. But the Court must have permitted them to be stamped (a): for that is the judg-

(a) Coles v. T[illegible] [illegible] 234. See p[illegible]

1805.

HUDDLESTON v. BRISCOE.

Distinction between an agreement, that may be stamped, paying the penalty, which the party will be permitted to stamp pending the cause, and one, upon which no action can be brought, unless stamped.

ment of the law; that, where a paper can be stamped, paying the penalty, it is no objection that it has not been stamped before the commencement of the suit. I had a difficulty in the Court of Common Pleas upon the point, whether the agreement ought to be stamped at the time of the action brought: but the distinction is taken in a case in the time of Lord *Raymond*, that, if the agreement is one, upon which no action is to be brought unless it is stamped, it must be stamped before action brought: but if it is an agreement, which you may get stamped, paying the penalty, there pending the action it may be stamped, and a cause has been allowed to stand over here upon that distinction. The consequence is, that, if the Court is not to act, where there has not been an observance of the Revenue Laws, neither is it to turn the party round, if, before the suit is over, those Laws are complied with.

[596] It has been said, that these letters are not upon stamps. Of the fact there is no proof, nor any allegation, except at the Bar. The question upon that is of great importance to the suitors, not only here, but in every Court of *Westminster-hall*. Soon after the Act passed this question was much considered by me. I believe, I made the objection without effect before Lord *Kenyon*. It is an objection, that has not been acted upon in the vast variety of cases, in which a specific performance has been decreed. Further, it is an objection that never availed at Law; and whenever an action has been brought upon an agreement, that ought to be on a stamp, and the form of pleading has been such, that at the trial it was not necessary to produce the instrument, as if it was admitted upon the record, and the trial was upon issues collateral to the existence of the agreement, it has never been considered as open to the Court to examine the question, whether the instrument was legally available with reference to the Stamp Laws. In this Court previously to the Act, and since, where a suit has been instituted upon a deed, if the Defendant admitted the instrument, and put the Plaintiff in possession of the power of reading the bill and answer, the instrument has never been produced; and the Court never examines whether it was stamped; but leaves the party liable to penalties; except in cases where the Legislature require an instrument stamped, as the only evidence of the transaction; and says expressly, that otherwise the instrument shall not be read in evidence. I do not know, that even that clause makes the production of the stamp necessary, where the transaction is not in issue; for instance, in a suit by an executor for an account, if the Defendant admits, that a legacy has been paid; though the Legislature

interposes the necessity of a receipt, the Court would not inquire in such a suit, whether such a receipt actually passed. In this view of the case, by analogy to the practice of this Court in other cases, and * of Courts of Law, if the party has admitted that which, if not admitted, the Plaintiff must prove, it cannot be necessary to produce that evidence, which otherwise he must have brought forward.

1807.

[illegible] v. Batsor

[* 597]

The question then is, [illegible] in this case have dispensed with the necessity of producing the letters, and, if the draft of the bill, or the bill itself, could be read upon the hearing, is it necessary, that the bill or the draft should be stamped, not as instruments containing the obligation; but, under the [illegible] of the Act [illegible] continuing the effect of the contract. [illegible] of the Legislature was not [illegible] [illegible] [illegible] but [illegible] as part [illegible] The answer [illegible] in the [illegible] evidence, but [illegible] the necessity of [illegible] upon the ground, that [illegible] the correspondence [illegible] something [illegible] the answer itself which is an admission, [illegible] with the evidence [illegible] produced, [illegible] would [illegible] have been liable to objection; and the [illegible] that [illegible] produced, it would not appear [illegible] stamped [illegible] under the necessity of [illegible], whether it is stamped or not, unless the record [illegible] the Plaintiff to produce it. The point [illegible] more [illegible] than is supposed to belong [illegible] to support what has been the practice of this Court, and Courts of Law, with reference to a vast number of proceedings, which [illegible] decisions would disturb. I am hardly aware of the extent to which this would go in disturbing an infinite number of judgments, that rest upon no other ground.

[598]

This decree therefore is right [illegible] to be made upon reading the draft of the bill [illegible] altered by substituting for the words [illegible] "the record of the bill."

1805.

[illegible]mber 21.

The usual security for costs by a Plaintiff residing out of the jurisdiction, not increased upon special circumstances, as distress, unless, the Plaintiff asking some favour, terms may be imposed upon him.

OGILVIE v. HEARNE.

A MOTION was made, that the Plaintiff, residing in *Scotland*, should give security for costs, beyond the usual amount: viz 40*l.*

The particular circumstances, under which this application was made, were, that the Plaintiff, having employed the Defendants as his Solicitors, had, after considerable delay, upon their making an abatement in their bill of costs, given them a security for payment by instalments upon a *West India* estate, to which he was entitled in right of his wife. The Defendants were under the necessity of instituting a suit in Chancery against him, to obtain payment out of the consignments, to which having appeared he withdrew to the neighbourhood of *Holyrood-house* near *Edinburgh*, where he stood out all process until an order to take the bill *pro confesso* was made, after which he applied for leave to put in an answer, which was refused by The Lord *Chancellor* (a) The suit, in which this motion was made, was then instituted, praying [599] an account, and stating, that from embarrassed circumstances the Plaintiff was obliged to retire, and live in *Scotland.*

Mr. Romilly, for the Defendants, in support of the Motion.—The addition of the stamp duties, necessarily enhancing the costs of all law proceedings, is alone a sufficient ground for increasing the security beyond the sum of 40*l.* required by the old rule But under the particular circumstances of this case the Court will take care, that proper security shall be given, to guard the Defendants from injury by the suit, which the Plaintiff has instituted, as Lord *Hardwicke* in *Gage* v *Lady Strafford (a)* under the circumstances compelled the Plaintiff to give security to the amount of 300*l*

Mr Hart, for the Plaintiff, insisted upon the general rule, and said, that in *Gage* v *Lady Strafford* the Plaintiff came for extraordinary indulgence, praying a Commission abroad, which must occasion considerable expense to both parties: the Court therefore had a discretion to grant that upon terms: but in this instance the Court has no discretion, but must be governed by the general rule, that a Plaintiff out of the jurisdiction shall give security for costs to the extent of 40*l.*

The Lord CHANCELLOR —I have Lord *Hardwicke's* authority, that the Court before his time never acted upon

(a) *Hearne* v. *Ogilvie, ante,* 77

(a) [illegible] 2 Ves. 356.

the special circumstances, existing only at the time of the bill filed, in departing from the general rule. I am not aware that since that case the Court has ever departed from it; I think, I remember, that it has refused to interpose. This is a * general rule of great strength; for there is no case, in which security for costs has been given, where the Court, if acting upon discretion, would not have been justified by the circumstances in saying, 40*l.* was much too little. As to the stamp duties, they warrant the Court to endeavour to lay down some general rule for the future, that will suit the circumstances of the times: but that is a ground for general interposition, not to act in a particular case. So, with regard to the distress of the Plaintiff; that is not a ground, upon which the Court has specially interposed. The Court will not require security for costs from any man in *Ireland*, upon any representation of his circumstances: and the rule, that has been laid down as to security for costs to be given by Plaintiffs abroad, is considered as a general rule, applying to rich and poor. If the Plaintiff comes for a favour, upon which the Court can fasten terms, that is a ground that may prevail against the general practice. I doubt upon what Lord *Hardwicke* says, that it should be discretionary in every case, unless he means, that it should be referred to the Master in every instance to look into the case; not, that the Court itself is in every case to examine, and say, what will be right. I cannot make

1805. Ogilvie v. Hearne. [* 600]

COFFIN *v.* COOPER. Dec. 23.

AN order to confirm the Master's report *nisi* having been obtained, the party at the last Seal, on *Saturday* the 21st of *December*, obtained leave to move on *Monday* to confirm the report absolutely. The reason of the application was, that the eight days, which had not expired on the Seal day, might be complete.

Motion not to be postponed, so as to effect the right to notice.

The Lord CHANCELLOR said, he ought not to have given that permission; and refused to make the order. [601]

1805

Dec. 17. 24

DONNE v. LEWIS.

Original decree not to be found, but having been acted upon by reports and recited in an order on further directions, was allowed to be drawn up from an office copy, and entered *nunc pro tunc*.

A MOTION was made, that the *Register* may be at liberty to draw up and pass the original decree in this cause from the office copy; and that the same, when drawn up, may be entered *nunc pro tunc*. This application was made under these circumstances. The original decree could not be found: but there were two reports of the Master, and an order, made on further directions in 1788, reciting the decree, made in *July*, 1787, that order, however varying from the minute in the *Register's* minute book.

Mr Richards, in support of the Motion, cited *Williamson* v. *Henshaw*,(a) and *Jesson* v. *Brewer*.(b)

The Lord CHANCELLOR.—This is of great importance. The Court will enter a decree *nunc pro tunc*, if satisfied from its own official documents, that it is only doing now what it would have done then. *Primâ facie* the Court will not make the entry different from the minute. But, if it turns out in fact, that the Court itself has in an order recited the decree, as made, and if there is an office copy of the decree, that office copy corresponding with what is recited in the order, that office copy must be taken to be the copy of an original, and would be evidence that there was such a decree.

[602] Dec. 24.

The Lord CHANCELLOR.—As the Court has frequently acted under this decree, that does not appear to have been passed and entered, the order may be made. But I hope, there will never be an instance of this again.

(a) 1 *Dick*. 129. (b) 1 *Dick*. 370.

Dec. 24.

LASHLEY v. HOGG.

After decree the bill cannot be dismissed by consent; but an arrangement for disposing of the fund in Court may have effect by consent on further directions.

A DECREE had been made for an account, with the usual direction for advertisements for creditors.

A petition was presented, under an arrangement, with the consent of all parties, and all the creditors, who had come in, the time having expired, for dismissing the bill and disposing of the funds in Court.

Mr. Roupell, in support of the Petition 1805.

The *Lord* CHANCELLOR said, he could not dismiss the bill after a decree, except upon a re-hearing or appeal; but the object as to the disposition of the funds might be obtained by consent upon further directions; and, though the time had elapsed, yet the Court will let in creditors at any time, while the fund is in Court.

LASHLEY v. HOGG

Creditors let in at any time, while the fund is in Court, though the time has elapsed.

Ex parte ALCOCK [603]

Dec. 21.

A PETITION was presented by joint-creditors, to have the choice of Assignees under a separate Commission of Bankruptcy declared irregular, and void, that a new choice may be directed, and, that a particular creditor, against whom an account was prayed, may not be permitted to vote.

Mr. Fonblanque, and Mr. Cullen, in support of the Petition.

Joint-creditors cannot vote or interfere in the choice of Assignees under a separate Commission of Bankruptcy.

The *Lord* CHANCELLOR.—Joint-creditors are not permitted to vote in the choice of Assignees under a separate Commission, even in the strong case where there is only one separate creditor, and large joint property. Lord *Thurlow* constantly refused it. The consequence is, that joint-creditors cannot interfere with the choice of the separate creditors by telling them, whom they shall not elect. That is the established practice in Bankruptcy, and I have followed it.

Ex parte KEBBLE. [604]

August 27.
November 19.
December 23.

THIS petition prayed an order for maintenance on behalf of five infants, to whom a residue was bequeathed, with survivorship among them in case of the death of any under the age of twenty-one, and, in case all of them should die under that age, the whole was given to their

Residue bequeathed to infants, with survivorship among them in the event of death under the age of twenty-one. Maintenance, not being directed by the will, was not ordered by the Court, there being a limitation over upon the death of all under twenty-one to their sister, having no other interest in that fund, though a distinct legatee by the same will.

The case, in which the Court has given maintenance, has been, where the fund, being given to the children with survivorship among them, their interests, and the chance of taking the whole, as survivor, was equal, and no other person interested.

1805. *Ex parte* KEBBELL.

sister, who took no interest directly in that residue: but a legacy was given to her by the same will, and in case of her death under the age of twenty-one, that legacy was given over to the other five children. The will gave no direction as to maintenance.

Mr. Hall, in support of the Petition, referred to *Greenwell* v. *Greenwell*,(a) and the authorities upon which that order was made.

The Lord CHANCELLOR.—The case, in which maintenance has been allowed, though not given by the will, is, where there are children, some or one of whom must take the property, and all have an equal chance by surviving, and a present interest. But it cannot be done, if there is a gift over; or, if the children are not all the persons among whom it is to go; as in Sir *Frederick Eden*'s case; where Lord *Rosslyn* had directed it; but, upon an application for an increase of the allowance, I did not think [605] myself justified in following that; and refused it; as those children might be the persons to take the whole; but future children, then unborn, might be the persons to take a part of it. By this will five children have this residue given to them, with survivorship among them; and the sixth has nothing given to her in that fund, unless all the five die under the age of twenty-one. So the five would be maintained at her expense; for she has no interest in common with them. Where is the difference between her and a mere stranger? She is not a legatee of this residue with the other five: but it is given over to her, as to a stranger, only in the event of the death of all the five under the age of twenty-one; and, while it remains contingent, she has no interest with them. The circumstance, that she has a legacy by another part of the will, cannot alter it. If no legacy was given to her, it could not be contended; for this has not been allowed, except, where all had a chance, and an equal chance; and there is no instance of setting off one legacy against another in this way. There is no case, in which interest of property, directed to accumulate, has been applied to maintenance, except where there was one principal sum, in which all were interested. I wish very well to the application, if I can find a principle upon which it can rest.

Nov. 19. *Mr. Hall, in support of the Petition*, cited *Collis* v. *Blackburn*,(a) and *Fairman* v. *Green*.(b)

(a) *Ante*, vol. x. 194. *Cavendish* v. *Mager*, *Fendall* v. *Nash*, *ante*, vol. v. 1[illegible], n. 197, n. See *Lomax* v. *Lomax*, *ante*, 48.

(a) p. 605. *Ante*, vol. ix. 170. (b) *Ante*, vol. x. 45.

The Lord CHANCELLOR.—The case of *Fairman* v. *Green* is not within the former cases, in which the gift over was to the children who should survive, and therefore maintenance was given, the chance being equal; but in that case, as in this, all the children might die under twenty-one, and none of them might take. The former cases, after great struggle, go this length, that, where there are equal legacies to a class of children, even with a direction for accumulation, the principal with the accumulation to be paid at twenty-one, with survivorship in case of the death of any under that age to the others, the chance of all taking or the survivor being equal, the Court takes the fund, which belongs to all, and must go to all, or some of them, and maintains them all out of the interest. But the principle cannot be applied, where the legacy is not given absolutely to the children and the survivor, but in case of the death of a child under twenty-one there is a limitation to the issue, who for that purpose are as strangers. In this case, as in that, the property may never belong to any of these children. 1805. *Ex parte* KEBBLE. [606]

The application was renewed. *Dec.* 23.

The Lord CHANCELLOR said, there were some older cases than those that were produced in *Greenwell* v. *Greenwell*,(a) within some of which this would fall: but his Lordship said, he did not know the principle upon which those cases could be maintained; and refused to make the order in this instance.

(a) [illegible] vol. v. 194.

LAMBERT *v.* LAMBERT.

[607] *January* 16, 1806.

The MASTER *of the* ROLLS *for The Lord* CHANCELLOR.

SIR *HENRY LAMBERT*, by his will gave the following among other legacies: Legacies to one younger child of "the sum of

"To my truly and most beloved second son *Frederick* "12,000*l.* of my funded property to be transferred in his name, or employed as it shall "appear most beneficial." To another, "the sum of 12,000*l.*" in every respect the same." To a third, "the sum of 12,000*l.* to be enjoyed by him in every respect" as the former: the residue real and personal to the eldest son.

The legacies to the younger children pecuniary, not specific: (1) the fund, if deficient, to be equally divided among them.

{(1) See *Lupton* v. *Lupton*, 2 Johns. Ch. Rep. 614.}

1806. LAMBERT v. LAMBERT.

"*Robert Lambert* I bequeath the sum of twelve thousand "pounds of my funded property to be transferred in his "name or employed as it shall appear most beneficial for "the interest of the said *Frederick Robert* by my executors according to the situation of the times.

"To my truly and most beloved third son *Francis* "*John Lambert* I also bequeath the sum of twelve thousand pounds in every respect the same as I have specified in the case of my second son *Frederick Robert*.

"To my truly and most beloved fourth son *Lionel* "*Hyde Lambert* I equally bequeath the sum of twelve "thousand pounds to be enjoyed by him in every respect as in the case of my third son *Francis John*," &c.

The bill was filed by the eldest son; to whom all the testator's estate real and personal was devised and bequeathed, subject to the legacies, and under a decree, directing the accounts, the Master's report stated, that there was due to each of the younger sons the sum of 13,221*l* 0s 9*d* for principal and interest on their respective legacies, to which report exceptions were taken, on

[608] the ground, that each of the legatees was entitled to have transferred to him so much funded property as would amount to the sum of 12,000*l* in stock, and not to 12,000*l*. in sterling money.

Mr. Richards, and Mr. Wetherell, in support of the Exceptions, relied on the expression of the clause giving the first legacy, "to be transferred;" peculiarly applicable to funded property, and not to cash They stated, that, if these should be considered money legacies, there would be no surplus for the eldest son, and, according to *Kirby* v. *Potter*, (a) the intention, if plain, must make the legacy specific.

Mr. Romilly, and Mr. Phillimore, for the Report, were stopped by the Court.

The Master of the Rolls held clearly, that the children under these bequests were entitled to the worth of 12,000*l*. each out of this property, if sufficient to afford it; and, if not sufficient, they were entitled to have it equally divided among them: if there should be any surplus, that would belong to the general estate of the testator.

(a) *Ante*, vol iv 718 *Dean* v *Test*, *ante*, vol ix. 146.

1806.

January 28

LYON *v.* DUMBELL.

The only answer to the motion to dismiss the bill for want of prosecution is the undertaking to speed the cause. Special circumstances must be the ground of special application.

MR. BELL, for the Defendant, moved to dismiss the bill for want of prosecution.

Mr. Piggott, and Mr. Johnson, for the Plaintiff, were proceeding to state some special circumstances, as an answer to the motion.

* *The Lord* CHANCELLOR.—It has been settled upon great consideration, (*a*) that you cannot take advantage of special circumstances by way of answer to this application; that there can be no answer to this motion but an undertaking to speed the cause; and therefore any special circumstances must be the ground of a special application. The notice may stand over, that the Plaintiff may have the opportunity of applying. [* 609]

The usual undertaking to speed the cause was given.

(*a*) [illegible], vol. [illegible].

Ex parte KNOTT.

Feb. 3, 4.

The claim to tack by a third mortgagee, having taken in the first mortgage of the inheritance, but subject to a term outstanding, given up as against a mesne encumbrancer, as against the Assignees under the Bankruptcy of the mortgagor, Query: the Commission being subsequent to the last mortgage, whether the Act of Bankruptcy was previous, doubtful. No objection, that the consideration for the last mortgage was a debt originally by simple contract.

A COMMISSION of Bankruptcy issued against *David Tanner* in *September*, 1798. The first claim of the petitioners was under an assignment in 1803, from *Elizabeth Hoskins*, the first mortgagee of the inheritance of estates of the Bankrupt, subject to an outstanding term: the original mortgage being clearly long previous to the Bankruptcy. Secondly, the petitioners claimed under a mortgage made to them in *June* preceding the date of the Commission, to secure a debt of 5500*l.* due to them in the course of trade; the Assignees in opposition to that claim relying upon an Act of Bankruptcy in 1796, which however was disputed, and notice denied. 3dly, they claimed a right to tack that debt, not only against * the Assignees, but also against *Jutley Barnaby*, a *mesne* encumbrancer; insisting upon his priority in date: the petitioners denying notice of that encumbrance. The [* 610]

1806. estate was sold, and the money invested in the funds, subject to the claims.

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Mr. Romilly, and Mr. Bell, in support of the Petition.—The case of *Collet* v. *De Gols* (a) is decisive in favour of the petitioners; and there are some older authorities, that a Court of Equity will not give any assistance against a person, who advanced money to the Bankrupt without notice of the Bankruptcy, not even making him discover what the Commissioners might compel him to discover: *Perrat* v. *Ballard*. (b) *Wagstaff* v. *Read*. (c) *Brown* v. *Williams*. (d) *Wilker* v. *Bodington*. (e) The transfer to the Assignees by the Act of Bankruptcy does not differ from any other transfer.

The other question is as to the order, in which these debts are to be paid. The petitioners, not having had notice of *Barnaby*'s intermediate encumbrance, are entitled to priority. The objection is, that, though the petitioners have the inheritance, there is a term outstanding, not in *Barnaby*, but in a third person, and *Barnaby* says, he has applied for, and may obtain an assignment. There is no instance, where the Court refused to act upon the rights of the parties, as they stood at the hearing, on the ground, that one might get in an outstanding term. Nor would an assignment avail him, for the person, in whom that term is vested, is a trustee for the
[611] person, who has the inheritance, and an assignment to any other person would be a breach of trust. The doctrine upon that subject is laid down by your Lordship in *Maundrell* v. *Maundrell*. (a)

Mr. Richards, and Mr. Hart, for the Assignees under the Commission of Bankruptcy.—The petitioner did not lend any money upon the security of the estate, but took a security, not three months before the Commission, for a debt due upon other accounts, viz. for goods sold and delivered in that year. Great stress was laid upon that distinction by Sir *Joseph Jekyll* in the case of *Brace* v. *The Duchess of Marlborough*. (b) Upon that point alone the petitioners cannot support this claim against the Assignees under the Bankruptcy of the mortgagor; who are purchasers for the creditors, for a consideration equally valuable as in the case of an actual purchase; and with reference to the Act of Bankruptcy. The principle, established by that case, is, that the person, lending the money, must lend it upon the faith of the land. If the loan was of any other description, he cannot have the preference, for a Court of Equity will in general relieve

(a) For. 65.
(b) 2 Ch. Cas. 72.
(c) 2 Ch. Ca. 156.
(d) 2 Ch. Cas. 135.
(e) 2 Vern. 599.

(a) p. 611. *Ante*, vol. x. 246. vol. vii. 567.
(b) 2 P. Wms. 491.

according to priority; and, to induce the Court to depart from the rule, a creditor must bring himself strictly within the exception. It is clear, this debt was not contracted upon the faith of the land. By the Act of Bankruptcy all the Bankrupt's property is taken out of him; and the Assignees become in Law the owners of it. The Bankrupt could not give a security. He had no means of providing for payment. The money was due, not from him, but from his estate, in the hands of his Assignees. He could not by giving one creditor a security prevent the effect of an Act of Bankruptcy. Where money is lent upon the faith of the land, the case is very different: the lender being in possession, dealing with the land as the ostensible owner, the mortgagee deals with him fairly, and advances his money *bona fide*, in confidence of a dealing permitted by the creditors themselves, who allow their debtor to appear as the visible owner. But the case of an actual Bankrupt, having no property, borrowing money, or taking goods, for his own use, and the lender, when he cannot obtain payment, taking a security out of the wreck of the property, has a very different description. In 1796, this mortgagor was in the most embarrassed circumstances, on the eve of Bankruptcy, continually getting worse until his failure in 1798, not three months after the security made.

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As to the other point, the petitioners have the legal fee, but encumbered with a legal term. A Court of Equity does not assist these persons: neither does it give assistance against them; only not depriving them of the "*tabula in naufragio*," if they have it. But, the term being outstanding, the petitioners have not the Law with them. If we could have got that in, we might have squeezed out that mortgage of 1798 entirely.

The Lord CHANCELLOR.—If the mortgagee had the deed, you could not.

For the Assignees.—Notwithstanding what is said by Lord *Hardwicke*, (*a*) and by your Lordship, following him in *Maundrell* v. *Maundrell*, that may be (*b*) questioned.

[613]

The Lord CHANCELLOR.—Disliking the whole doctrine, I examined every part of it with jealousy in *Maundrell* v. *Maundrell.* (*c*) It goes upon this; that, if the purchaser has got the original title-deed to the term, the Court can-

A subsequent encumbrancer without notice protected by getting possession of the deed creating an outstanding term. As to the consequence to the trustee, assigning to him, though aware of a prior encumbrance, and whether the Court would interfere by injunction, *Query.*

(*a*) See *Willoughby* v. *Willoughby*, 1 *Term Rep.* 763.
(*b*) *Ante*, vol. x. 260. 269.   (*c*) *Ante*, vol. x. 246. vol. vii. 567.

1806. not be satisfied that there is any truth in the assertion, that the legal estate is in the person, who the adversary says has it. Lord *Hardwicke* thought, as you cannot in many cases trace the representative, if the purchaser uses so much diligence as to take possession of the deed, a Court of Equity ought not to compel him to produce that deed to his prejudice. It is not determined, what is the situation of the trustee, who makes the assignment. Lord *Hardwicke* says, the question is not, whether the trustee shall be punished; but, whether the purchaser shall hold under the breach of trust. That is strange doctrine; and I desire to be understood, that I have not made up my mind, that the Court would not restrain the trustees from permitting their names to be used. From some saving expressions I do not conceive Lord *Hardwicke* meant to determine, that the trustee, aware of the prior encumbrance, would be safe in making the assignment to a subsequent encumbrancer. One of the greatest difficulties I met with in deciding the case of *Maundrell* v. *Maundrell* was Lord *Hardwicke*'s expression, that the purchaser would be safe in taking the assignment, if he could get

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[614] it; but his Lordship would not say, the trustee would be safe. Surely, if the purchaser would be safe, the trustee ought to be so.

For the Assignees.—The Court would not compel a discovery; but would not interfere, if an ejectment could be maintained without the deed, and an Act of Bankruptcy, previous to the conveyance to the petitioners, can be proved: whence the advantage arises, of which in *Collet* v. *De Gols* (a) Lord *Talbot* said he would not deprive the party. In that case, the prior encumbrance was got before the Commission was taken out; and there was no notice that the party was a trader, and therefore subject to the Bankrupt Laws. After a Commission issued a prior encumbrance cannot be taken in; to support that which is declared to all the world to be nothing; not merely an infirm security; under which the party, not having even a *scintilla* of interest, cannot claim the assistance of a Court of Equity in opposition to its general rules. Why should not a Commission of Bankruptcy have the same effect for this purpose as a decree? After a decree, directing a reference to the Master to settle priorities, the subsequent encumbrancer would not be permitted to take in a term, in order to squeeze out another encumbrance: but the priorities must remain as they stood at the date of the decree. So a Commission of Bankruptcy is a public declaration, that the rights of encumbrancers shall be settled as they stood at that time: the Law de-

(a) For 65.

claring, that the property shall be distributed among the creditors according to the rule of Law; which distribution a creditor shall not defeat by his own act, taking in the legal estate. Another objection in the way of the petitioners is, that the conveyance to them by the first mortgagee did not take place until 1803: from the moment the Commission issued the first mortgagee became a trustee for the general creditors, subject to her mortgage; and could not defeat their right by transferring to another person; who by relation to the Act of Bankruptcy has no interest in the estate. 1806. Ex parte KNOTT [615]

Mr. Romilly, in Reply.—If, as it is said, in *Collet* v. *De Gols*,(a) the prior encumbrance was got before the Commission was taken out, that would not make a distinction But that does not appear by the report

The Lord CHANCELLOR.—That case proves, that money advanced after an Act of Bankruptcy, may be tacked, and charged upon the estate, notwithstanding the property is taken out of the Bankrupt, and it was urged there, that he had nothing to convey by the second mortgage. Yet it was held, that, though the legal effect of the second mortgage is nothing, the Court will consider it a second encumbrance. The distinction was taken, that a secret Act of Bankruptcy does not prevent tacking, as a Commission issued actually does: that being notice to all the world. Upon some former occasion I find, I inserted in my copy of that report these dates from the *Register's* Book. The Bankruptcy was on the 25th of *December*, 1722: the last deed upon the 13th of *August*, 1725; and the Commission upon the 19th of *June*, 1726. The statement at the beginning of the report is otherwise scarcely intelligible.

Reply.—That supplies what does not appear in the report. It cannot be contended, that the effect of a Commission of Bankruptcy is virtually a decree to settle priorities. There is no distinction upon the circumstance, that money was not actually advanced at the time. It has often been decided, that a person, taking a security or an estate in consideration of a debt previously existing, is equally a purchaser for valuable consideration as upon an advance of money at the same time. The only distinction is, that in the one case the advance being made, and the conveyance executed, at different periods, notice must be denied at both. This also stands upon reason, for it cannot be required, that the creditor should go through the useless ceremony of taking his debt from the debtor, and paying it back again to him, which would put the [616]

(a) For. 65.

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creditor in the situation of a purchaser. The Assignees are in the same situation as the mortgagor himself, and cannot object to paying both encumbrances, as the condition of redemption; merely as there happens to be a term outstanding in some other person. No person representing the mortgagor can raise that objection; though perhaps with an intermediate encumbrancer there may be a considerable question, whether he can be shut out. But those, who represent the mortgagor, can be permitted to redeem only upon doing Equity. If a mortgagor dies, leaving a will, not discovered, and the heir taking possession, and supposing he has the title, makes a second mortgage, could the devisee, when the will came to light, redeem without paying both? Though I do not know, that such a case has occurred, there can be no doubt upon the principle.

Mr. Alexander, for the mesne Encumbrancer, Barnaby, did not argue the point as to his right to priority; as it was given up in the reply.

[617] *The Lord* CHANCELLOR.—Upon some parts of this case I have not doubt enough to induce me to postpone the judgment. The Assignees have contended that there is a difference between dealing originally for a mortgage and a debt, originally by simple contract, and afterwards continued upon the immediate credit of the land, under a new contract; the creditor waiving his right of insisting upon his debt at present, provided his debtor will give a security upon the land. That appeared to me to all equitable intents a security upon the land. The effect of the subsequent transaction is a contract, that the land shall be pledged for the debt. I have not altered my opinion upon looking into the case of *Brace* v. *The Duchess of Marlborough*,(a) which goes upon this; that a mere judgment-creditor, though he deals originally for a lien, does not get an estate originally in the land. He has neither *jus in re* nor *jus ad rem*. But, if there is once a creditor by mortgage, and he afterwards advances money upon a judgment, the Court will intend, that he makes that advance, meaning to take a security upon the land for both; and he may tack: but if he remains a mere judgment-creditor, the Court says, he does not deal upon the faith of the land, in this sense, that he does not contract for an interest in the land; and therefore is entitled only, as a judgment-creditor, to an *elegit;* and he cannot tack.(b) (1) But that is not the case of a creditor, origi-

Mortgagee may tack a subsequent judgment, but a mere judgment-creditor cannot tack, not contracting for an interest in the land, though he has a lien.

(a) 2 *P. Wms* 491

(b) *Jackson* v. *Langford* the Anonymous Case, 2 *Ves.* 662, *Reg. Book* A, 1754

{(1) See *Hauser* v. *Fortner*, 2 Binn. 40. *Rodgers* v. *Gibson et al.* 4 Yeates, 111.}

nally, by simple contract, bond, or judgment, who thinks proper to say, he will remain such no longer; but will have either payment or a pledge for his money: that is, for a continuance of the loan he will have an interest in the land, and that only. The contract is changed. Before, he could call for immediate payment of what was due: but, after the mortgage, he can only call for payment at the day upon which, by the contract, the money is to be paid: a situation altogether different in point of contract. As between him and the Assignees of the Bankrupt, who are only Parliamentary grantees for the creditors, having no interest in the land before, it is impossible that they can make that objection.

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The point of *Barnaby*, as connected with that, requires great consideration: I mean, as to the circumstance, that there is an outstanding term, with reference to the possibility, that recovery might be had at Law, even without the production of these instruments. It is contended, that the outstanding instrument is in Equity to be held for the protection of all the estates, according to priority: that is, according to the dates. I shall not go through all the doctrine, which I examined with great jealousy in *Maundrell* v. *Maundrell*, (a) as that was the first case of the class that occurred, while I have sat here, furnishing a great principle. I shall only observe now, that, when such a point as this comes to be discussed, if the legal estate has not been got in, it must be considered with reference to the question, whether the first encumbrancer has a better right to call for an assignment of the legal estate; and from that circumstance a Court of Equity is bound to hold, not only, that the first mortgage shall be protected; as it was the first equitable security; but that mortgagee, having a better right to call for the assignment, is in Equity in the same state as if he had it. Before I could decide that question in Bankruptcy, a jurisdiction, in which there is no appeal, I must be satisfied, that there was no danger of error, if the question were before me upon a bill.

The question of priority between encumbrancers, if the legal estate has not been got in, depends upon the better right to call for it, and the prior encumbrancer, if he has that right, is in Equity in the same state as if he had an assignment (1)

[619]

Upon another point there is no doubt. It is said, the Act devests the Bankrupt of all his interest; and when the Commission follows, it operates by relation from the time the Act of Bankruptcy was committed. Unquestionably it does; and then the person, taking the second security, really takes nothing, no interest passing from the Bankrupt; and therefore shall not tack. All the cases show, that this objection will not do; for then it would have been in vain to discuss, whether there is a difference

The right to tack in Equity not affected by the relation to the Act of Bankruptcy.

(a) *Ante*, vol. x. 246. Vol. vii. 567.

{(1) *Williamson* v. *Gordon's Ex.* 5 Munf. 237.}

1806. Ex parte KNOTT.

between securities after an Act of Bankruptcy, and after a Commission issued. It follows of necessity, that the law is the same in both cases; for the operation of the Commission is in either case precisely the same; reducing to dust and ashes the second security. There is no difficulty upon the point as to a decree to settle priorities. After that you cannot tack certainly; (a) for there is a judgment for the creditors, that they shall be paid according to their priorities. But you may, as was held in the House of Lords, (b) up to the time of the decree struggle for the *tabula in naufragio*; and though the decree is in a sense only a judgment upon the rights, as they stood at the time the bill was filed, yet it was decided in that case, that until the decree you might do so.

Tacking allowed up to a decree to settle priorities, not afterwards.

The next point, that was insisted upon, is, that the Commission has the same effect as a decree. That is not so. The Commission is no judgment for creditors. It is only a conveyance for the security of creditors: and the utmost, that can be stated from all these cases, is, that the question is to be agitated between persons, having securities, and the Assignees, as persons, having securities, or as purchasers for valuable consideration. The point being now given up, as against the *mesne* encumbrancer, who, it is admitted, is to be considered as having all the rights of a purchaser for valuable consideration, the case is reduced to the question, whether the Assignees are to be so considered; or, as having any right in Equity beyond what the Bankrupt himself would have: the petitioner insisting, that, if the Assignees come to redeem under the circumstances of this case, he may hold the same language to the Assignees as to the Bankrupt; that there should be no redemption, until all the money was paid, that was advanced upon the faith of the land. On the other hand it is contended, that after Bankruptcy, and the conveyance for the creditors in general, the Assignees are to be considered purchasers for the creditors; and their right stands upon the same principle, as if the debtor had not become Bankrupt, but had made a conveyance in trust for payment of the creditors. If it turns out upon the authorities and principles, that the latter is the true way of putting it, the question will be the same, as if the argument for *Barnaby*, the *mesne* encumbrancer, had been heard. The simple point therefore is, whether, supposing *Barnaby* could maintain his situation, upon the ground, that there is an outstanding term, that ought to be considered a security for all equitable interests according to priority, the Assignees also can insist upon that;

Distinction as to tacking between a Commission of Bankruptcy and a decree to settle priorities.

[620]

(a) *Wortley* v. *Birkhead*, 2 *Ves.* 571.
(b) *Belchier* v. *Renforth*, 6 *Bro. P. C.* [illegible]

or can contend only for the same interest as the Bankrupt himself could. I cannot reconcile the point, that the Assignees stand just in the same situation as the Bankrupt, and not in a better, with passages; and indeed the doctrines, in some of the cases. 1806. *Ex parte* KNOTT.

Upon that point I shall consider further.

The following order was afterwards made. [621]

The petitioners consenting, that *Lutley Barnaby* shall stand in order according to the date of his security, by the consent of all parties it was ordered, that the petitioners and *Woodward*, *Proby*, *Barnaby*, and *Green*, the Assignee, and all other necessary parties, should join in the execution of conveyances to *John Barnaby*, the purchaser; and deliver up the assignment of the term and other deeds, &c. to him, without prejudice to the question as to the right of them tacking their mortgage to the mortgage of *Elizabeth Hoskins*: that the sum of 43,000*l.* Consolidated Bank Annuities be sold; and the sum of 11,133*l.* 3*s.* and another sum, due to the petitioners on the mortgage of *Elizabeth Hoskins*, be paid to them on account of the said mortgage upon the execution of the conveyance; without prejudice to the question, how the residue of the money due upon the mortgage, and the costs, are to be paid. An issue was directed, whether *David Tanner* had before the 1st of *January*, 1799, and before the 22d of *June*, 1798, the date of the first mortgage after the supposed Bankruptcy, committed any Act of Bankruptcy.

MESTAER *v.* GILLESPIE.

1804. *Nov.* 15, 16, 26. 1805 *Feb.* 8.

Whether, the legal title under an assignment of a share in a ship failing under the Ship-Registry Acts, 26 *Geo.* III. c. 60. 34 *Geo.* III. c. 68, for want of the indorsement upon the Certificate within ten days after the return of the ship to port; if that was prevented by fraud, relief can be had in Equity; in what form, and whether it may not be had as to the freight, if not as to the ship, though both were comprised in the same bill of sale.

UPON a motion for an injunction the circumstances according to the bill and answer were these. The Defendants, the *Beatsons*, being indebted to the Plaintiff * to the amount of 4000*l* proposed, and it was agreed, that the Plaintiff should accept bills to the amount of 7000*l*.; in consideration of which, and the debt of 4000*l.* the *Beatsons* should assign to the Plaintiffs one moiety of two ships, called the *Juliana* and the *Ocean*, then in dock,

[* 622]

1806.

MESTAER v. GILLESPIE.

building; that the ships should be sold for the mutual benefit of the Plaintiff and the *Beatsons*; and the bills accepted by the Plaintiff should be discharged out of the produce of the sale; and in the mean time should be renewed; and the whole of the ship *Juliana* was to be assigned to the Plaintiff as a security for performance of the agreement.

This agreement became abortive; the *Beatsons* being disappointed in their expectation of redeeming some securities they had formerly given upon those ships. The parties then came to another agreement; by which, in consideration of 11,000*l.* composed in the same manner of the original debt of 4000*l.* and the Plaintiff's acceptances for 7000*l* the *Beatsons* agreed to assign to the Plaintiff three-fourth parts of the ship *Atlas*, then at sea, freighted by the *East India* Company, with the proportion of the freight. A bill of sale was executed accordingly on the 3d of *July*, 1803, by the *Beatsons* to the Plaintiff of three-fourths of the ship and the freight under the charter-party, entered into by the *East India* Company, and all other freight, that might become due: but the indorsement upon the Certificate of the registry, required by the Acts of Parliament,(a) not being made within ten days after the return of the ship to port, on the 17th of *December*, an action of trover was brought by the Assignees under a Commission of Bankruptcy, issued against the *Beatsons*, and judgment being recovered by [623] the Plaintiffs in that action, and possession of the ship having been obtained by them, this bill was filed; and a motion was made by the Plaintiff, that the Defendants, the *East India* Company, may be directed to pay the balance due for the freight of the *Atlas* into Court; and that the other Defendants may be restrained from proceeding at Law: the indorsement of the Certificate within the ten days, for which application was made immediately on the ship's arrival, having been prevented by the *Beatsons*. The circumstances that prevented the indorsement of the Certificate appeared according to the bill and answer, though not distinctly, to be, that the *Beatsons* proposed terms: viz. that the Plaintiff would give up the first instalment of the freight, to be applied in discharge of acceptances they had given for 2600*l.* in part of the debt of 4000*l.*; and should pay the costs of actions, that had been brought against the *Beatsons* upon some of the Plaintiff's acceptances, which were dishonoured.

The Attorney-General,(a) *Mr Romilly, and Mr. Bell, in support of the Motion,* insisted, that under these circum-

(a) Stat. 26 *Geo.* III. *c.* 60. Stat. 34 *Geo.* III. *c.* 68. *s.* 16.
(a) p. 623. The Hon. *Spencer Perceval.*

1806.

MISIALE v. GILLESPIE.

[illegible] the Act [illegible] of the Certificate, which was prevented by what must be considered a fraud upon the Plaintiff, the Defendants insisting upon terms, to which they were not entitled, this Court would relieve: otherwise the Registry Act would be made the engine of fraud.

The Solicitor-General,(b) Mr Richards, and Mr Steele, for the Defendants, the Assignees under the Bankruptcy, contended, that this Court could not relieve against the positive terms of the Act in this case, any more than in *Hibbert* v. *Rolleston:(a)* the rights of third persons intervening; though if the question was only between the Plaintiff and the Bankrupts, they might be compelled to execute a proper contract, and even if the imputation of fraud could be maintained, which was a proper subject for a jury, the policy of the law must prevent the relief. [624]

The Lord CHANCELLOR.—The Bankruptcy makes no difference in this case Whatever relief might have been obtained against the Bankrupts may be had against their Assignees. At present, unless it can be made out, that this Plaintiff was wilfully and fraudulently prevented by the *Beatsons* from having his title made good, I do not see any ground for relief in this Court: but, if a jury upon the issue, whether that was fraudulently prevented should find the affirmative, the Assignees, representing the creditors, could not possibly avail themselves of that fraud. Upon that two questions arise: 1st, can this Court interpose; putting the case, that a fraud of that species, and with those consequences, has been committed: 2dly, Do the circumstances of this case authorize the Court to say, such a fraud has been committed? Upon the former point the injunction ought not to be granted, unless the question of law is a grave and serious question; fit for judicial consideration and decision. In the case of *Rolleston* v. *Hibbert,(b)* in the Court of *King's Bench*, the decision of a Court of Law could not possibly be any other. The question being as to the property in the ship, if the instrument has not all the particulars required by the Act, must have been decided immediately as it was stated. But in a variety of cases, though the property would not pass at Law, an Equity would arise to have a legal title made. In * the case, for instance, of a conveyance by bargain and sale, which cannot be complete as a legal conveyance without enrolment, (a) yet that very instrument, not enrolled; as an agreement to convey the obligation arising from the payment of the money.

Relief in Equity upon a bargain and sale, though

(b) Sir *Thomas Manners Sutton.*
(b) 3 *Term Rep.* 406
(a) p 621 3 *Bro C. C* 571
(a) p 625 Stat 27 *Hen* VIII

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only inchoate, and not complete to pass the [illegible] in this Court evidence of an agreement to convey, and the conscience is bound to make further assurance, the obligation arising from the payment of the money. Many other cases may be put.

When the question came before Lord *Thurlow*, (b) his Lordship had great doubt upon it. That case was not decided in public: but I happen to know, The Lord *Chancellor* gave his reasons to the Counsel on both sides; and the ground of the judgment, distinguishing the case from those, to which it was compared, upon the Statute of Frauds, (c) and the bargain and sale without enrolment, was, that the policy of that Act of Parliament was to make the instrument, so defective, void to all intents and purposes, and the object of that policy could not be attained, if such a thing as an equitable title to the ship could subsist, as parties might rest upon their equitable title, without desiring the legal title. The object being, that there should be a public registry, accessible, of the ownership of all vessels, navigating to and from the *British* dominions, the Legislature had declared, that this object should be secured by a bill of sale, that should be such in the form and contents, as to manifest all the circumstances necessary to secure the knowledge, who were the owners, from time to time, by which the history of the ship from the moment she was built might be pursued. Upon another question, whether, when it was decided, that the property did not pass, the party could be

Policy of the Ship-Registry Acts.

[626] compelled to refund the money, if the answer should be, that it was by no fault of his that the other had not a good title, but the fault of the assignor himself, such an answer could not be given to an action brought to recover the money in a case of this sort, if the circumstances will sustain the imputation of fraud by the Bankrupts in not performing their part of the agreement, express or implied, imposing on them the obligation to accede to the request of the Assignee, to enable him upon the ship's arrival to make good his title; which having prevented, they could not at Law say, the money should not be refunded. There is therefore a difference even at Law upon that supposition between this case and *Rolleston* v. *Hibbert*. (a)

Next, as to the power of a Court of Equity, my opinion is, that, if this is a case of fraud, the case of *Hibbert* v. *Rolleston*, (b) has no application, and this case is to be decided with reference to what Courts of Equity are in the habit of doing in cases, where instruments are

(b) *Hibbert* v. *Rolleston* 3 *Bro. C. C.* 571.
(c) Stat. 29 *Ch.* 2. c. 3.
(a) p. 626 3 *Term Rep.* 406.
(b) 3 *Bro. C. C.* 571.

[illegible] and the [illegible]- | 1806.
[illegible] Acts of Parliament. The [illegible] was | MISTAIR v. GILLESPIE.
[illegible] the policy of the former Act, in [illegible]re-
spect, among others, to exclude, as far as was practicable
and just, the interposition of a Court of Equity, where
the legal title was not obtained; expressly adopting the
doctrine of *Hibbert* v. *Rolleston*. But that case does not
in any degree determine this; for this reason: that was
precisely such a case as occurs every day upon the grant
of an Annuity: the grantor saying, he has offered to do
all that is necessary, and has done all that is to be
done by him, and, if the grantee has not done what is
necessary, the blame is with him, and the consequence
must fall upon him. The defect in *Hibbert* v. *Rolleston* [627]
was only a slip in point of caution by the Assignee, not
inserting some words, that ought to have been in the bill
of sale. The policy certainly was just the same without
those words, as with them: but the Act positively re-
quires those words, and therefore no Court could in-
terfere. (a)

But that is not the case alleged by this bill, that the Plaintiff was improperly, wilfully, and fraudulently, prevented from making good his title, and prevented by the *Beatsons*, bound in conscience to assist him in all his endeavours for that purpose. Supposing that true, another question arises, and I agree, there can be no relief in Equity, if the Act has positively said so. On the other hand, if that is not expressly declared, or the relief clearly excluded by the policy of the Act, the equitable jurisdiction upon fraud exists. Many other cases may be put. Suppose a ship at sea sold for 10,000*l.*, and by circumstances she becomes worth 20,000*l.*, and upon the return of the ship the master, being a friend of the vendor, is kept out of the way, and there could be no conviction of him, or proceeding according to the Act: in that simple case, nothing resting in agreement, but the title conveyed as far as possible, and the consequential right to have it made good prevented by a clear, palpable, fraud, would there be a right to come here, or to bring an action? Many circumstances may be supposed, that would make it impossible to recover the actual damages; or to place the party in the actual state, in which he ought to be. Then, what has this Court been in the habit of doing? As to the policy of the Act, a variety of instances, that might be put, which would terrify all mankind from dealing for a ship at sea, must be considered. Upon the Statute of Frauds, (b) though declaring, that

(a) See *ante*, vol. vi. 715, in *Curtis* v. *Perry*.
(b) Stat. 29 Ch. 2. c. 3.

1806. interests [illegible] shall not be found, except by writing, cases in this Court [illegible] perfectly familiar, deciding, that fraudulent use shall not be made of that Statute; where this Court has interfered against a party, meaning to make it an instrument of fraud, and said, he should not take advantage of his own fraud; even, though the Statute has declared, that, in case those circumstances do not exist, the instrument shall be absolutely void. One instance is the case of instructions upon a treaty of marriage: the conveyance being absolute; but subject to an agreement for a defeazance; which, though not appearing by the contents of the conveyance, can be proved *aliunde*, and there are many other instances

Mestaer v Gillespie.

[*628]

Relief against the Statute of Frauds on the ground of fraud, as against an absolute conveyance upon marriage, the agreement being subject to a defeazance

I do not say, attending to the whole policy of these two Acts of Parliament, this is a case, in which the Court finally will be at liberty to proceed upon that ground But the question at present is, whether I can take upon myself at this moment to say, that upon full consideration of all that can be submitted, this Court has clearly no right to interfere For the purpose of the present interposition of this Court it is sufficient to say, the case furnishes a question of great doubt as to the law. One considerable question is, who was from the moment of the execution of the bill of sale under the agreement, that from that moment this interest in the ship should be the property of the Plaintiff, the owner, having a right to call upon the Master. The question upon the facts is, whether, attending to what was proposed by the *Beatsons*, as reasonable, or not, this Plaintiff can be represented as having been wilfully and fraudulently prevented from effectuating his title during those ten days. I do not know, that it is necessary to insert the word "fraudulently," as the ground of relief; if it was wilful, and the effect was the same incapacity. According to my present opinion,
[629] that remains in sufficient doubt to require further investigation, to determine the real quality and nature of that transaction.

Nov. 16 *The Lord* CHANCELLOR.—Another question has occurred to me, which is very important, and has never been decided; whether notwithstanding the Act of Parliament the assignment is not good as to the freight. There is nothing in the Act as to that The 11,000*l.* is a consideration for the freight, as well as the ship. Suppose the freight had been assigned by a separate instrument, what would be the objection? Then, if the assignment gives a right to the freight, that will sustain this bill, independent of the other question. It is usual to

assign the freight without the ship, and the Assignee [illegible] for his own interest. Actions have been frequently brought upon insurances of the freight and of the ship, in which the owners were distinct persons. In *Camden v. Anderson*, (a) it was never doubted, that the property in the freight and in the ship might be in different persons. The whole argument admits that. Then upon a separate assignment of the freight no proceeding under this Act of Parliament is taken. This is a very important case, and I will hear it argued again, with the assistance of *The Master of the Rolls*.

1806.

MESTAER v. GILLESPIE.

The property in the freight may be distinct from that in the ship, and is an insurable interest.

1804. Nov. 26.

The motion was again made before *The Lord* CHANCELLOR and *The Master of the Rolls*.

The Attorney-General, (b) *Mr. Romilly*, and *Mr. Bell*, *in support of the Motion*.—There are two questions: one as to the right to the freight: the other as to the interest in the ship itself. The expiration of the ten days was not necessary to complete the right to the freight. At any time during that period the *East India* Company would have been justified in paying that to the Plaintiff. The assignment of the freight is express and distinct, not as a consequence of the assignment of the ship. It has never been conceived, that assignment of freight, which is very usual in *London*, is within the Act. There is no instance of a registry of such an assignment. [630]

As to the ship itself, the *Beatsons* were the persons, upon whom the duty of doing what was necessary to complete the title was imposed. The act was to be done, not by the Plaintiff, but by them. They, as owners, were to call upon the other part-owner, the master, to deliver up the Certificate of the registry for that purpose. Endeavouring to impose upon the Plaintiff new terms, which they had no right to impose, they must be considered as absolutely refusing to adhere to the terms, to which they were originally bound. That is a sort of dealing for their own interest, an advantage taken of a legal form, with a view to their own benefit, of which this Court will not permit them to avail themselves; not holding the transfer legal; but taking care that there shall be a legal transfer. Though the question is new, as applied to this particular case, the sale of a ship at sea, and the indorsement of the Certificate under the Registry Act (a) prevented by fraud, the principles of Equity in other cases show clearly that the Court will interpose. Though it certainly

(a) 5 Term Rep. 709.

(b) The Hon. Spencer Perceval.

(a) p. 630. Stat. 26 Geo. III. c. 60. Stat. 34 Geo. III. c. 68.

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is decided, that there cannot be an equitable [illegible] if there is not a legal one, it is not decided, that a person, who has by fraud prevented a legal [illegible], shall be permitted to take advantage of his own fraud, [illegible] considered the owner.

[* 631] This may be illustrated by several cases. These acts have been compared to the Annuity Act.(a) If after the grant of an Annuity the grantor, by an erasure, contrived that the memorial, registered by the grantee, should not be a true memorial, there can be no doubt, notwithstanding the positive terms of that Act, relief would be given. So upon the Statute of Frauds:(b) if, a testator intending to execute a will, every thing being done, except the execution, and being at the point of death, the witnesses were sent for, to attest the execution, and the heir by force kept back one, there can be no doubt that Equity would relieve. Though there can be no will but in writing as to personal estate, except a nuncupative will, it has been frequently decided, that a legacy though merely verbal, shall have effect, if the executor prevented it from being put in writing. By analogy to those cases there can be no doubt, that, if this Act was prevented by fraud, relief will be given, and if there is doubt upon it, the injunction will be granted, that the question may be tried. As to the general policy of the Act, what can be more impolitic in such a country as this than a construction, the effect of which must be to prevent the sale of ships at sea? If this can succeed on the ground, that the Act is positive, upon the same ground the owners may attain the object by keeping the master out of the way.

The Solicitor-General,(c) Mr. Richards, Mr. Steel, and Mr. Abbott, for the Defendants, the Assignees under the [632] *Commission of Bankruptcy*.—The Plaintiff having got a security, which is by the Act declared null and void, whether that is by the conduct of the parties, or by mistake, as in *Hibbert* v. *Rolleston*,(a) or by Bankruptcy, as in *Moss* v. *Charnock*,(b) or accident, is in this Court precisely the same. Relief cannot be given in any of these cases, if it is not to be given in all. The reason is, according to the judgment in *Hibbert* v. *Rolleston*, and *Moss* v. *Charnock*, that no relief can be given in Law or Equity against the positive, imperative, words of the Act. There can be no equitable title, by accident, mistake, or in any other way. Even, as to the remedy given by the Act against the master, if he was perverse, and would not deliver the instrument, but would rather go to prison, so

(a) Stat. 17 *Geo* III c 26.
(b) Stat. 29 Ch. 2. c. 3.
(c) Sir *Thomas Manners Sutton*.
(a) p. 632. [illegible] 571.
(b) 2 *East* 399.

[illegible] impossible for the original owner to do the [illegible] Court would not relieve against that. If the ship should arrive suddenly, the owner being abroad, a prisoner, ill, insane, or under any other incapac[illegible] even under such circumstances the whole would be v[illegible] this, with the exception of the Annuity Act, is the [illegible] Act, which does not admit relief under such circumstances, or even against fraud the particular mischief being overlooked on account of the public benefit. If the policy of the law prevents the relief against accident, how can it be given against a wrongful Act; *Moss* v *Charnock* decides, that there can in such a case as this be no relation to the original transaction of the bill of sale, and in that case a complete answer is given to the argument, comparing this to the case of a bargain and sale without enrolment, from the difference of expression in the Statutes. The answer to the charge of fraud, raised by this Plaintiff, is, that he first violated the agreement, permitting his own bills to be dishonoured, and the Defendants to be sued upon them

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[633]

As to the freight, the earnings of the ship, to become due, that is an interest in the ship, which cannot be assigned except under this Act: otherwise the whole object of the Legislature would be defeated The principal object of the Act was to prevent foreigners from gaining those advantages, to which *British* traders, navigating *British* ships, alone were to be entitled The freight is the only beneficial interest. It becomes due by the contract upon delivery of the cargo If an assignment of the freight is exempted from the operation of this Act, a foreigner might obtain the only benefit, to be derived from the ship. An interest in the freight would make the proprietor liable to all the debts, and to the Bankrupt Laws. Such an interest is as much within this Act of Parliament as a devise of the produce of an estate would be within the Mortmain Acts In *Camden* v. *Anderson* (a) there certainly was no distinct assignment of the freight. So, this is one entire instrument, rendered by the Act void to all intents and purposes, not a distinct assignment of the freight, but coupled with the interest in the ship If an assignment of the freight for one voyage in not within this Act, neither is a general assignment of the freight for all the time the ship might be able to keep the sea. Such an assignment of all the future earnings, substantially an assignment of the ship itself, is against the policy of the law; and, if permitted would place within the reach of foreigners all the beneficial interest in the ship; to prevent which was the object of the Legislature. This

(a) 5 Term Rep 709

1806. is [illegible] freight [illegible]
purpose [illegible] the interest in the ship. [illegible]

Mestaer v. Gillespie. ject being to [illegible] both, and failing as to the ship, the principal must also fail as its accessory.

[* 634] This *Attorney-General* (a) *in Reply*.—There is no authority which comes near the point now contended; that even fraud shall be permitted to have effect. The cases upon the Statute of Frauds (b) are admitted. The distinction is plain between fraud and accident, as in the case, mentioned by your Lordship, a recovery not suffered, in consequence of the Attorney having his leg broken, there could be no relief. This wilful refusal by the Defendants to do an act they were bound to do, with a view to their own advantage, must be considered as a fraud in this Court. As to the freight, the question has never been argued, and the daily habit, in the City, is to transfer that without any interest in the ship. The words of the Act cannot be applied to such an interest As to the objection upon the policy of the Act, that the freight may be assigned to a foreigner, a foreigner may have an interest in a charter-party, and the ship may thus be let to a foreigner at a nominal freight, so that he would have all the beneficial interest in her., the *English* ownership still remaining. Foreigners have therefore the means of acquiring the beneficial interest in the freight; and the Act, if intended to prevent that, would have said, no *English* ship should be chartered to a foreigner. *Camden* v. *Anderson* is quite distinct: the freight is there represented to belong to them in the character of owners. In *Moss* v. *Charnock* (c) the ground of the judgment was the delay of the Defendant. That case is no authority against this

[635] Plaintiff, who had done every thing he could, had clothed himself with the legal interest to a certain extent: this formal Act only remaining to be done after the arrival of the ship; which could not be done before. The question results to this, whether under this Act the Court is bound to look only to the legal title, and not to the circumstances amounting to fraud. That is a question of great doubt; and therefore at least the Court will not now let the property go out of its reach.

The Lord Chancellor.—I will now state what occurs to me upon this subject; wishing to have the advice of *The Master of the Rolls* upon the soundness of my opinion in this stage of the cause; which involves questions of very high importance. The object of this motion is, first, to bring the freight into Court: 2dly, [illegible] the in-

(a) The Hon *Spencer Perceval.*
(b) Stat. 29. *Ch* II c. 3 (c) 2 *East.* 39[illegible]

junction. If the case of the Defendants is in obscurity, that is to be attributed to themselves, who ought to state it, as it is in fact, by their answer. The meaning of this transaction is this. The Plaintiff was a creditor of the *Beatsons* to the amount of 4000*l.* and had come under acceptances for 7000*l.* The share of the ship was to be assigned, together with benefit of the charter-party entered into with the *East India* Company, and all future earnings; for that is the meaning of it, to be a security to the Plaintiff with regard to the debt of 4000*l.* and to enable him to reimburse himself such of his acceptances as he should discharge, if in the course of negotiation he should be compelled to pay them, and the *Beatsons* should not pay them. It depended entirely upon them, whether this, his only security, should be made good, or not. The answer leaves the question of fact, whether the conduct of the Defendants was a wilful and fraudulent prevention, making it impossible for the Plaintiff to complete his title, in sufficient doubt, to make it fit that it should be tried. The next consideration is, if that fact should be found in the affirmative, as to the law of this Court, whether relief can be given. [636]

First, as to the freight, if by a separate instrument the *Beatsons* had assigned their equitable right in the charter-party, there cannot be a doubt, without going through the authorities and principles, that would have amounted to an agreement in Equity, assigning the benefit of that covenant from the *East India* Company to *Duncan* for them. Next, is there any difference from the circumstance, that the freight is assigned by the same bill of sale, that assigns the interest in the ship? For the purpose of obtaining an injunction it is sufficient, that the question is important and doubtful. But I have a strong inclination upon that. Without entering into the point, whether the mere assignment of a ship would carry her earnings, in this instance the benefit of that contract specifically and by name is intended. If that is so, and it is true, that a separate assignment of the freight does not require registry, does the Act, declaring, that the bill of sale shall be void to all intents and purposes, mean, that it shall be ineffectual, not only as to the vessel, but also as to every other interest, which the party may have attempted to pass by the same instrument? I am not convinced, that the doctrine of Equity is not, that the instrument is void as to all, with regard to which that instrument was to operate a transfer, viz. the ship; for, as to the freight, the bill of sale is only an agreement in Equity. If the doctrine is true, as it has been pressed, how can freight be assigned? Will not this Court say, the instru-

Assignment of freight alone is not within the Ship-Registry Acts.

1806.

MESTAER v. GILLESPIE

[* 637]

Sale of a ship at sea valid, notwithstanding the Bankruptcy of the vendor before her arrival in port, and therefore before the title is complete by the indorsement on the Certificate of registry, if the other requisites of the Ship Registry Act were previously complied with

ment shall be considered effectual to pass that, which can only be conveyed by agreement?

* As to the generality of the proposition, stated by a very able Judge in *Moss* v. *Charnock*,(a) a very full consideration of all that must be held the doctrine under this Act of Parliament, leads me to doubt, whether that must not be qualified: otherwise there has been a great miscarriage certainly in Courts of Equity, conceiving, that there is an analogy between this and the Annuity Act.(b) The proposition, as stated in that judgment, goes to this extent, that, if a man sold a ship at sea, the vendee having done every thing required by the Act that could be done, but afterwards, before the arrival of the ship in port, an Act of Bankruptcy was committed by the vendor, the Assignees under the Commission of Bankruptcy, not the vendee, would take the ship. The proposition is not so stated in terms: but the language, in which the judgment is expressed, covers that case. I cannot concur in that; and I apprehend, the proposition, that the grant of an Annuity is good for nothing, if a Bankruptcy takes place before enrolment would have been a considerable surprise upon Lord *Thurlow*. My observation does not apply to the actual decision of that case. Another case occurs in the same Statute, very material to the shipping interest of this country. The Act contemplates the case, not only of the sale of a ship at sea, but also of a ship in port, the owner being abroad, directing a transfer, with possession immediately, and allowing six months for the indorsement, and ten days after the return of the owner; and that word "owner" there shows the meaning of the same word in the other section. The consideration of that is very material, if the vendee may have had the possession all that time, and yet, during those ten days a Bankruptcy taking place, the indorsement will not do
638 by relation, and the title is devested from the beginning. The relation operates with great hardship one way.

It may not be difficult at the hearing to state a case, representing, that after the assignment the party did receive the freight before the expiration of the ten days. The question, whether the freight did not pass, though the ship did not, is very important, and very doubtful. It is impossible to say, the ship passed at Law or in Equity. But this case does not fall in any degree within *Hibbert* v. *Rolleston*,(a) and is entirely new. That was a case between parties meaning, the one to give, the other to take a legal title, which was insufficient. Nothing but that legal title was in the contemplation of either.

(a) 2 *East* 399. (b) Stat. 17 Geo. 3. c. 26.
(a) p. 638. 3 *Bro. C. C.* 571.

The principle of Lord *Thurlow*'s decision went no further than this, that, an invalid legal security being taken, there was nothing, upon which an application to Equity could rest. This case, unless the policy of the Act intervenes, comes much nearer other cases that have been stated at the bar: the case, for instance, of a devisee, who, the testator communicating his intention of charging a legacy, tells him, it is unnecessary to give himself that trouble, and the legacy shall be paid. In that case there is no will, giving the legacy: but this Court says, that he, who prevented that, shall stand in this Court in a very different situation from that in which he would stand in a Court of Law, where he would be a devisee without any charge; but in this Court, having by his undertaking prevented an effectual charge, [illegible] subject to it.

So, in the case of [illegible], Lord [illegible], tenant in tail, meaning to [illegible] recovery, and by will to give real interests to his [illegible] *Luttrell*, who by his marriage had an interest to prevent barring the entail, did by force and management prevent the testator from signing the deed to make the tenant to the *præcipe*. Lord *Thurlow*'s opinion was clear, that, though at Law *Mr. Luttrell*'s lady was tenant in tail, and, which makes it stronger, she was no party to the transaction, yet neither he nor any one else could have the benefit of that fraud: and the jury upon an issue directed having found, that the recovery was fraudulently prevented, Lord *Thurlow* held, even in favour of a volunteer, that the tenant in tail should not take advantage of the iniquitous act, though she was not a party to it, and the estate was considered exactly as if a recovery had been suffered.

In this case, as in that, the party comes here, saying, he has neither a legal nor an equitable title, but he was prevented by the fraud of the Defendants from having a legal title, desiring this Court on account of that fraud to make him a good legal title. I allow the difficulty, with reference to the terms of this Act, upon the distinction, well taken at the Bar, as to the Annuity Act, (a) that the Annuity Act was intended merely as a protection to private rights, the object of this Act being the public interest as well as the rights of the parties. But it is to be considered, if the party will be contented with less than his rights, and the public interest is in the same situation, whether there is not a principle, by which, though the fraud has prevented the full benefit to the party, he shall have all this Court can give him, not infringing the public interest, and, whether, though per-

(a) Stat. 17 Geo. III. c. 26.

1805.

Mestaer v. Gillespie.

Devisee, preventing the testator from charging a legacy by undertaking to pay it, bound in Equity, though not at Law.

Tenant in tail, prevented from suffering a recovery by the fraud of a person whose wife is entitled in remainder. Relief in Equity, treating the estate, even in favour of a volunteer, as if the recovery had been suffered.

[*639]

Distinction between the Ship-Registry Acts and the Annuity Act, upon the public policy of the former.

1806.
MESSIER v GILLESPIE
[*640]

Plaintiff may have a specific performance in part, waiving the rest, and the Defendant cannot object

haps we cannot give him all the benefit he would have had, if no fraud or prevention had occurred, as then the title would have been complete the moment the indorsement * was made, there is not substantial relief, that we may give him consistently with the Act. In that view it is necessary to consider, in what form the relief ought to be administered. It is familiar to come to this Court for a specific performance of an agreement, the whole benefit of which the party cannot ha and, if he waives that part, it is not competent to the other party to refuse to perform the rest; as the whole cannot be executed. Whe would be the mischief to the public, whatever may be the opinion as to the ownership between the day on which the fraud was committed, and the completion of a legal title in directing a bill of sale to be now executed, transferring the legal title, if the Plaintiff will take it, from this time, instead of an earlier period? Here we must consider all the cases of trust to which I have alluded. The case is not to be decided here without considering what ought to be done in *Camden* v *Anderson*,(a) *Heath* v *Hubbard*,(b) and the infinite variety of cases, in which, if land was in question, this Court would say, a trust would be implied from the payment of money.

In the first stage of this cause it will not be proper to go further than to give an opinion upon questions as important as any, that have occurred, and the only effect would be to place the freight and damages in the hands of the Assignees. The case may go to an appeal; and surely under such circumstances the Assignees would not distribute. The best course will be to order the freight into Court, and to direct an issue upon the question of fact; the arbitration to proceed, to determine, what are the actual damages, and they may afterwards make such motion to have those damages paid into Court, as they may be advised.

[641] *The Master of the Rolls*.—If it was necessary now to give any opinion that would conclude the interests, or decide the general question, that has been so ably discussed, I should require more time to form a deliberate judgment. But the very doubts, that would occa require that deliberation, afford a ground su dispose of this motion. First, the real state of the is left in some degree unascertained. Upon first reading the answer it appeared to me, that the new terms proposed by the Defendants, as the condition upon which the transfer should be completed, were such as they had no right to propose, and that the proposition in such cir-

(a) 5 Term Rep 709 (b) 4 East. 110

cumstances was in reality a wilful and fraudulent obstruction of the completion of the transfer. The act to be done depending entirely upon them, when they annex an unreasonable condition, it cannot be said, they do not wilfully and fraudulently obstruct the act, nothing entitling them to propose such terms I do not see, how they could, except by express agreement, call upon the Plaintiffs to take up the bills they had accepted for the debt originally due. If they accepted between the two agreements, there was nothing in the first, that rendered it incumbent upon the creditor to take up the bills he had drawn. If, as is stated to be the fact, they accepted those bills after the second agreement, not proposing any terms to modify that agreement, as the condition, their acceptance stands on one side: their agreement stands untouched upon the other. They ought to have objected, that it was contrary to the faith of the agreement, that he should have a security for the whole debt, having their acceptance for part Accepting without stipulation they completely waive that objection, consenting to pay that portion of the old debt, letting the Plaintiff keep the assignment. Their proposition therefore as to the freight is not warranted. So, they had no right to demand the other article of that proposition. [642]

1806.

M. v. GILLESPIE.

It is stated this day, that there is doubt upon the whole transaction, whether this ought to be considered such a wilful and fraudulent pretence upon the part of the Defendants, as should lead to the construction, that they had by their act wilfully and fraudulently prevented the transfer. Whether the consequence of the delay was distinctly in their contemplation does not appear, that the interest in the ship could not be transferred at all. Some further discussion and facts would be necessary, before that character ought to be fixed upon the transaction. I therefore perfectly agree to the proposition to put this in some course of inquiry.

Upon the supposition, that the fact should turn out, that the Defendants did wilfully and fraudulently prevent the completion of the transfer, a question of great importance, and, as it seems to me, of great nicety, arises. Whenever that comes to be discussed, the Court will be pressed on each side by considerable difficulties and embarrassments There is no doubt, by the express words of the Act, the bill of sale and the contract are absolutely void to all intents and purposes. The question is, whether there is any admissible evidence of any agreement, except this very bill of sale, which is to all intents and purposes void and null It is to be considered, that this Act was framed, not for the purpose of ascertaining the rights of parties against each other, or protecting them

Public policy of the Ship-Registry Acts.

1806.
MESTAER v. GILLESPIE.

from fraud, but with the view to a great purpose of public policy, and the Act in all its provisions compels them to observe regulations, not in any degree requisite for their own private interests, in order to accomplish the ends of the Act. It may be said, the Legislature, having [643] proposed their object, proposed the only means, by which that object was to be secured, judging of the propriety of enforcing that object, and by such means, embracing that object, and prescribing those means, whatever inconvenience might result to private individuals. The harshness therefore in particular instances is not to be taken into consideration: the object being, not to provide for the interests of parties, as against each other, but at all events to attain that great object of public policy, to which it might be thought right to sacrifice individual convenience and justice, according to ordinary rules. It may be said, you are not to propose substitutes, and cases may arise, in which it may be necessary to contend the length, that the intention of the Act was entirely to withdraw this whole subject from all equitable jurisdiction, that, as it is admitted, there may be cases of accident, not to be relieved, which in the ordinary jurisdiction this Court would provide for, the Legislature might have meant, that in other cases also, though giving a stronger claim to equitable interposition, still it should be precluded, though by the ordinary rules the Court would interfere. It may be said, such a case has occurred, and yet the Court did not consider itself at liberty to interpose.

On the other hand, it is necessary to maintain a proposition, altogether new here, and sounding strange to any person, accustomed to the principles, upon which justice is here administered: new, as the case of *Hibbert* v. *Rolleston*, (a) will not by any means necessarily govern the decision in this instance, for, besides the distinction that has been stated, in that case, a contract, the validity of which was acknowledged by the Act, never existed for a moment, the Act declaring it, in its inception, invalid to all intents and purposes. There never [644] was an obligation therefore upon one party to do any act. But in this case a great number of acts, recognised by the Statute, have been done, the validity of which is acknowledged down to the end of the ten days. A bill of sale has been executed, in the terms prescribed; and every thing has been done, except the indorsement upon the Certificate. Upon the first day after the return of the ship the Plaintiff was entitled in a Court of Justice to say, here is a binding, valid, bill of sale, recognised by

(a) 3 Bro. C. C. 571.

1806.
MISTALE v. GILLESPIE

the Act, and, to complete it, there is only wanting a formality, to be done by the Defendants. There was a foundation for a decree within the ten days, if the Court had any ground for a decree, and that continued during nine days. Then it comes to this: a man, bound by an instrument, and in a situation upon a given day to have a decision upon it in a Court of Justice, the only act remaining to be done by him, shall he say, it is his pleasure not to comply with his own engagement; that instrument at that moment being valid and effectual? Can he say, he will give no reason, except that it is his pleasure, but, that he will go no further, or, that he will do acts that render the completion of the engagement impracticable? That startles me prodigiously. No such proposition appears in *Hibbert* v. *Rolleston* (a). I should hesitate very much, notwithstanding the strong words of the Act, to say, a person so conducting himself is not to be reached in some way, as little inconsistent with the Act as possible, endeavouring to prevent such egregious injustice, at the same time leaving the policy of the Act secure. The cases, put for the Defendants, do not reach that point. They are only cases of hardship, where the completion of the engagement has become impracticable: not a party by his own act, the result of his own will, extricating himself from his contract.

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Notwithstanding this, I desire not to be understood, and I do not mean to give any opinion, that it would be practicable to get over the positive words of the Act. But surely upon these arguments questions of so much doubt arise, that they are not fit to be determined upon motion, but ought to wait the hearing of the cause. The doubts as to the transfer of the interest in the ship in one way extend to the question upon the freight: that is, if the contract is available as to the ship, it is of course as to the freight. There is ground to direct that to be brought into Court, as being involved in the ship. As a separate consideration, I am much disposed to agree with The Lord *Chancellor* in what his Lordship has said as to that: but it is unnecessary now to take up time by stating my reasons. That disposes of the whole of the points: 1st, the fact; which ought to be determined by an issue: next, as to the ship, which ought to be deferred till the hearing; and therefore the injunction is proper: 3dly, the separate question, as to the freight; if the Court should be of opinion, that the transfer of the ship is invalid.

1805. Feb. 8

The order was made accordingly, granting the injunc-

(a) 3 Bro. C. C. 571

1806 tion, and directing an issue. After the trial, the verdict establishing, that the Plaintiff was wrongfully prevented from contemplating his assignment, the motion was again argued before The Lord *Chancellor* and *The Master of the Rolls*, but, a compromise afterwards taking place, no judgment was given.

MESTAER *v.* GILLESPIE.

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Ex parte HILL.

1804 *Nov.* 9

Verdict and judgment after Bankruptcy in an action previously brought, whether for an antecedent debt by contract or mere damages in tort, the costs cannot be proved as a debt under the Commission

Whether in the case of Bankruptcy between verdict or nonsuit and judgment they can be proved, and as to the effect of the Certificate to discharge in such cases, *Query*

AN action was brought to recover the amount of the loss upon a re-sale of goods, for which by agreement the Defendant was to be liable. On the 31st of *March*, after the action brought, a Commission of Bankruptcy issued against the Defendant. The action was tried at *Guildhall*, on the 16th of *June*, and a verdict was obtained by the Plaintiff, who, having signed judgment, presented this petition; upon which a question was made, whether the costs could be proved under the Commission. The petition, which was supported by *Mr. Romilly*, and *Mr. Cullen*, and opposed by *Mr. Mansfield* and *Mr. Bell*, stood for judgment.

The Lord CHANCELLOR.—The facts in this case are, that the verdict, and of course the judgment and taxation of costs, were subsequent to the Commission of Bankruptcy. The question is, whether the costs, when taxed, or before they are taxed, can be a debt capable of being proved under the Commission. *Mr. Cullen* (*a*) puts it in this way; that, as the debt itself was antecedent to the Commission, the costs are a sort of incident to the recovery of the debt; and by a species of relation are to be considered due before the issuing of the Commission. That contradicted my general notion in a great degree; for I did not recollect any case, where, the verdict having been obtained after the Commission was taken, and no proceeding at Law having taken place, by virtue of which the costs were due previously to the Commis-

[647] sion, the Certificate discharged the debt created for the costs. It is a different question, whether, if the Certificate does discharge the debt for the costs, therefore the costs may be proved. *Mr. Cullen* has stated himself very ably upon this in his book; (*a*) whether accurately, will depend upon the cases I shall mention:

"It was formerly held, that, where judgment was

(*a*) *Cul. Bank. Law*, 105. (*a*) p. 647. *Cul. Bank. Law*, 104, &c.

"signed after the Bankruptcy, the costs, which were said "to have their origin in the judgment, were a debt accruing after the Bankruptcy, and therefore not proveable under the Commission." 1806. Ex parte Hill.

The case *Ex parte Todd*, (b) before Lord *Henley*, which is referred to, was a determination upon great consideration; and in no one of the subsequent cases either the Bar or the Bench were informed, that decision had actually taken place. If, therefore, that authority is displaced by subsequent judgment, it has been displaced under ignorance of such a decision.

"But it has been since determined, that, where there "is a verdict before the Bankruptcy, the costs may be "proved, although the judgment and taxation is subsequent; for the judgment is held to relate to the verdict, "and the costs *de incremento*, when taxed, are considered "as annexed to those found by the jury, and consolidated "with them by an equitable relation of law, and it "makes no difference, though the original cause of action was for a *tort;* for, the cause of action existing before the verdict, the damages are by the verdict ascertained and become a debt."

Upon that there are two cases in direct contradiction. [648] In one the contrary seems settled upon great consideration: and that was not cited in any subsequent case, and certainly not in that which contradicts it.

"So in the case of the costs of a nonsuit at *Nisi Prius* "before the Bankruptcy, on which the judgment of nonsuit and taxation of costs is not till after it; for in such "a case it is held, that the debt exists before, and the "taxation merely ascertains the amount, and this determination has been since followed, but with some doubt "of the principle."

The question upon that would be, whether a nonsuit at *Nisi Prius* would constitute a debt.

In like manner the costs of a *scire facias*, or writ "of "error brought after the Bankruptcy, to revive or reverse "respectively a judgment recovered before it, are held "to relate back to the original judgment; and it seems, "even where both the verdict and the judgment are after "the Bankruptcy, that the costs may be proved, if the "debt, for which the action was brought before the Bankruptcy, was such a liquidated debt as might have been "proved, independent of the action."

That, therefore, takes the distinction as to what *seems* the law, (the expression is no more,) upon a debt ascertained previously to the Bankruptcy, as creating a right

(b) Cited 3 *Wils.* 270

1806. Ex parte HILL

to prove the costs, or not. If by that it is meant, that a Bankrupt has been held under the Act discharged from such costs, that is a fact undeniable If from that it is to be concluded, that costs in such a case have ever been proved under the Commission under the view and order
[649] of the Court in Bankruptcy, I cannot find the authority for that; and I doubt very much, unless concluded by authority, whether it is possible upon principle to say, such proof should be made.

Costs incurred after Bankruptcy, discharged by the Certificate, as having relation to the original debt, yet not capable of being proved under the Commission.

Mr. Cullen then states, that there are several cases, in which costs of suit, incurred after the Bankruptcy, are held to be discharged by the Certificate, as having relation to the original debt, but which *Mr Cullen* conceives, and I assent to that, cannot be proved under the Commission. He proceeds thus:

"The principle of the cases, in which costs, incurred "after the Bankruptcy, have been allowed to be proved, "seems to be, not only that there was an actual debt "either originally or by verdict, or some act of the Court, "existing before the Bankruptcy, but that at least an in-"choate right to the costs was vested in the party by a "suit actually commenced before that time, and that the "subsequent proceedings were considered as springing "out of it, and as steps necessary only to complete a "right before vested, and to ascertain its amount."

The case put here is precisely that before the Court: a suit commenced before the Bankruptcy; but an ascertained debt by a verdict after it; and it is laid down here that the costs would be discharged by the relation to the original debt. But, connected with the former passage, it is stated as the law, that they could not be proved, unless by relation to the ascertained debt; and that, where the original cause of action is for a demand in its nature uncertain and contingent, as for damages in *tort*, the costs cannot be proved, unless there is a verdict before the Bankruptcy, for in such a case the subject, to which they are incident, was not a liquidated debt at the
[650] time of the Bankruptcy, or, which could have been proved under the Commission.

The effect of the cases in Equity, that is, in Bankruptcy, is thus stated:

"In Courts of Equity it is entirely in the discretion "of the Court, whether there shall be any costs at all. "There, it is said, the taxation constitutes the demand: "and if the taxation is subsequent to the Bankruptcy, "though the order for it was made before, the debt is "also subsequent; and cannot be proved under a Com-"mission." (a)

(a) *Ex parte Sneaps*, 1 *Cooke's Bank. Law*, 193. *Ed.* 5.

1806. *Ex parte* HILL.

That unquestionably was Lord *Thurlow's* doctrine, after great consideration, and I apprehend, he held that, not upon any such ground of distinction, as that the costs in Equity are in the discretion of the Court, but, considering an order of this Court analogous to a proceeding at Law, that the costs could not be proved, unless ascertained by taxation, and he seems to approve the law, as laid down by Lord *Henley* in *Ex parte Todd*.

In another book, also of considerable merit, *Hullock upon Costs*, this is stated. "When a debt arises before, "but a verdict is obtained, and the costs taxed, after the "Bankruptcy of the Defendant, though previous to the "allowance of his Certificate, the costs relate to and are "considered as part of the original debt, and the Cer-"tificate extends to both, and if a creditor obtain a ver-"dict before the issuing of a Commission of Bankruptcy "against the Defendant, he is entitled notwithstanding "final judgment should not be signed, till after the Com-"mission was taken out, to prove his costs, as well as "his debt."(a) [651]

That does not take the distinction, taken by *Mr. Cullen*, as to the difference with respect to liquidated and unliquidated demands.

There is another general book, *Mr. Cooke's*,(b) which I need not say, has great merit: and I do not find in any edition of that book any thing to show, that he had found an authority for holding out, that, where no verdict previous to the Bankruptcy was obtained, but a verdict was obtained afterwards, the costs taxed could be proved under the Commission. *Mr. Cullen*, who wrote later, has found himself under a difficulty, that led him to take the distinction, contrary certainly to what is the general doctrine, as to the relation between what may be proved and what the Certificate will discharge, and he points to the cases, in which the Certificate will discharge, and yet the demand cannot be proved.

The history of the point seems to be this. The case *Ex parte Todd*, a petition before Lord *Henley*, a very considerable Lawyer, was upon an ejectment tried, and a nonsuit(c) before the Bankruptcy, in respect of which costs would be due, and recoverable, when taxed. Upon the application to prove Lord *Henley* held, that the nonsuit was nothing, that until judgment there was no demand at Law for costs, and, the judgment being after the Bankruptcy, there was not a debt at the date of the

(a) *Aylett* v. *Harford*, 2 *H. Black.* 317.
(b) See *Cooke's Bank. Law*, 181.
(c) This case is the only account of it in print, 3 *Wils.* 270, where it is cited in argument, is stated as the case of a verdict for the Plaintiff.

1806. Ex parte HILL.

Commission; and the costs could not be proved In *Walter* v. *Sherlock (a)* the question was upon a Bankruptcy between the verdict and the judgment, and the damages were in the sense of the later cases an ascertained debt: but it was held, though the verdict was before the Bankruptcy, the costs could not be proved, being unliquidated at the Bankruptcy, and not only for that reason, but because there was no judgment for them. It is extremely material to observe, that in all the cases, in which this subject has been since agitated, it has not occurred, that the law was thus settled by those two cases. In *Lewis* v *Piercy*, *(b) Bouteflour* v. *Coats (c)* was cited; which has very little relation to the subject; and *Graham* v. *Benton, (d)* which is no sort of authority for what the Court did. It was put at the Bar upon this, that the costs were part of the original debt: it was given up on the other side, and the Court in the absence of two of the Judges seem to be of opinion, that the costs must be discharged by the Certificate, and gave no opinion, whether, if so, they could be proved Another case, *Longford* v *Ellis*, 25th *Geo.* 3, mentioned in the note, was an action for words and a Bankruptcy between the verdict and judgment Lord *Ellenborough*, then at the Bar, cited *Graham* v. *Benton*, which has a fair reference as an authority to that case; for there the Bankruptcy was between the verdict and judgment; and he contended, that the debt became ascertained by the verdict. If that is true, it follows in principle and just reasoning, that it would be proveable,
[653] being ascertained previously to the Bankruptcy. But that point, whether the costs do become ascertained by the verdict, was not discussed; and Lord *Henley* was of opinion they did not; and *Walter* v. *Sherlock* is a direct authority that they do not. In *Longford* v. *Ellis* the case of *Blandford* v. *Foote (a)* is mentioned, in which *Mr. Mansfield* argued strongly, that, the judgment being subsequent to the Commission, the Defendant was not within the Statute. *(b)* In *Longford* v. *Ellis* it was observed in reply, that the cases cited were founded on actions brought for an antecedent existing debt; not a mere right to recover damages; which is the origin of the distinction, taken by *Mr. Cullen*. *Willes J.* said, there was no distinction between a tort and a contract, where a judgment follows the verdict; and the decision therefore was, that he was discharged. *Walter* v. *Sherlock* is directly con-

(a) Cited 3 *Wils.* 270. 272 In both places the statement is different, and, as it appears, loose and incorrect In the one the representation is, that the *judgment* was *previous* to the Bankruptcy; in the other, that *during the Bankruptcy* the Plaintiff had a verdict, but had not judgment till after the Certificate.

(b) 1 *Hen. Blac.* 29. (c) *Cowp* 25. (d) 1 *Wils.* 41.

(a) p. 653. *Cowp.* 138 (b) Stat. 12 *Geo.* 3. c. 47. *Sect.* 2

trary; and the proposition was not quite clear of doubt originally, that the antecedent debt being liquidated, therefore the costs, as an incident, are to be considered liquidated, though *de facto* not liquidated, and no judgment for them, and they are not ascertained till taxation, and these authorities against it. *Blandford* v. *Foote* is an exceedingly strong case. The first proceeding, the institution of the suit, was after the Bankruptcy. The action being upon a bond, he would be entitled to interest up to the time, and the costs ascertained. They did not apply to prove; but brought a new action upon the judgment, and got judgment in that second action; which would accumulate the demand far beyond what it would have been at the Bankruptcy, and they also obtained costs in that action upon that judgment, upon which they had got principal, interest, and costs. It was argued, that the judgment being subsequent to the Commission, he was not discharged by the Statute: the judgment changed the nature of the debt, and being by the judgment a debt subsequent, he could not be discharged. The question was, not whether the interest and costs could be proved, but, whether the Certificate would discharge them. In other cases the reason for that goes strongly to intimate, that the debt could be proved.

1806. *Ex parte* Hill.

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The authority of that case is very great undoubtedly: but still it is a judgment, in which none of the prior cases were looked at, and if upon that it is contended, that the subsequent and accumulated interest upon interest, that there might be under the second judgment, and the subsequent costs, are to be proved, there must be some rule to regulate that species of proof, for the rule being, that in most cases the interest shall stop at the date of the Commission, subject to this, that, if the effects afterwards turn out sufficient to pay interest upon the debts carrying interest, it is permitted, not under any proof, but under an equity, first introduced in Sir *Stephen Evance's* case, (*a*) applied to Assignees settling with creditors, finally winding up the affairs, and only in cases of contract, it is to be considered, how the proof is to be made, if it follows, that, because the Certificate would discharge the demand, therefore it is to be proved. It must be considered, 1st, if it is under contract: 2dly, if included in the judgment, not as interest, but by way of damages. In the case, upon which I am observing, not only interest subsequent to the Bankruptcy, but interest upon interest, was converted into principal by the second judgment; and interest upon the costs given by the first judgment. As in respect of that interest, after the date of the Commission, no proof

Rule in Bankruptcy, that in most cases interest stops at the date of the Commission, subject to an Equity giving interest on debts, if finally the effects are sufficient.

(*a*) *Bromley* v. *Goodere*, 1 *Atk.* 75. *Ex parte Mills*, ante, vol. ii. 295.

1806. Ex parte Hill. can in most * cases be made, and in none in a strict sense has that interest been proved, *Blandford* v. *Foote* will require great consideration, before it can be admitted as an authority, that such proof can be made

[* 655] The case of *Bouteflour* v. *Coats*, cited in the case in the Court of Common Pleas, has not much relation to the subject. There was no doubt the debt was due. It does not appear in the case, when the verdict was obtained: nor is it material: for, the bail-bond being forfeited, the debt was upon that, and in this Court would have been, independent of the Statute, a security for what was actually due. In *Hurst* v. *Mead*,(a) the question was, whether the Certificate discharges the Bankrupt from the costs It was insisted, that they might have been proved under the Commission, and *Blandford* v. *Foote* is cited for that. but that was not held or said in that case The judgment is, that the taxation of costs was merely ascertaining the amount of the debt, but the debt existed previous to the Bankruptcy: a proposition Lord *Henley* upon consideration denied, and Lord *Thurlow* meant to deny with regard to costs upon orders of taxation here,(b) and which the Court went a great length to deny in *Walter* v. *Sherlock*: but that case, *Hurst* v. *Mead*, goes no further than this, that, if there is a nonsuit, which the Court of Common Pleas in another case say is nothing, the effect is to constitute a debt previous to the judgment, and that nothing is wanting but ascertainment, and if that is the case, I agree.

Then came *Watts* v. *Hart*, (c) in which *Adair*, Sergeant, collected many of the cases, but by no means all, and says, "this current of authorities is too strong to be

[656] "shaken by the single authority of *Hurst* v. *Mead*; which "appears to have been a hasty decision; as cause was "shown in the first instance." There is the authority of Lord Chief Justice *Eyre*, that if there was an actual debt existing before the Bankruptcy, it might have been proved under the Commission, independent of the action. As to that I say, that until I find it decided upon consideration of the cases, where there is an actual debt, but no verdict previous to the Bankruptcy, I must continue to doubt, whether the costs can be considered so ascertained, as to be proved under the Commission. The conclusion is, that it is impossible for me, if this was an application upon a Certificate for discharging the Bankrupt, not to say, there is great authority for it; but I must also say, that is not formed with sufficient attention

(a) 5 Term Rep. 365.
(b) Ex parte Sneape, 1 Cooke's Bank. Law, 193, Ed. 5.
(c) 1 Bos & Pull. 134.

to antecedent authorities. But the question before me is, not, whether the Certificate will discharge the man from the demand, but whether as there was an antecedent debt, though no verdict, and consequently no judgment, prior to the Bankruptcy, I cannot permit proof of those costs, which were not an ascertained, or even adjudged, demand till after the Bankruptcy, I am of opinion with Lord Chief Justice *Eyre*,(a) there is no principle for that; and no decision has been found, that goes that length; and unless satisfied, that I ought to make a judgment against the principle of law, as it appears to me, I will follow Lord *Henley* and Lord *Thurlow* in this point, and will not make that judgment.

1806.
Ex parte Hill.

It was observed at the Bar, that a nonsuit does not make even a certain debt; for if the party dies after a nonsuit, and before the day in Bank, the cause abates, and no debt whatsoever is created. There is an Act of Parliament in the time of *Charles* II. that prevents that in the case of a verdict.

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(a) See *Watts* v. *Hart*, 1 *Bos.* & *Pull.* 134. the conclusion of the judgment.

STUART *v.* THE MARQUIS OF BUTE.

1804. *Feb.* 4. 6.
1806. *Feb.* 1.
Ante, vol. iii. 212.

Testator gave all his waggon ways, rails, staiths, and all implements, utensils and things, at his death used or employed together with, or in, or for, the working, management, or employment, of his collieries, and which may be deemed as of the nature of personal estate, in trust, to be held, or enjoyed, with the collieries.

Decree by Lord *Rosslyn*, that under this bequest and upon the circumstances, money due from the fitters and others, and in the *Tyne* Bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock in trade passed.

That decree affirmed upon a re-hearing by Lord *Eldon*, but with considerable doubt.

THIS cause came on upon a petition of re-hearing, presented by the Plaintiff, the residuary legatee of the testator Lord *Bute*, against the order disallowing the exceptions as to the Master's report, and the decree pronounced by Lord *Rosslyn*.(a)

Mr. Mansfield, and *Mr. Cox*, *for the Plaintiff*.—Lord *Rosslyn* in making the decree in this cause relied on the decision, made by Lord *Northington*, and affirmed by the House of Lords, upon *Mr. Wortley's* will; (b) the words

(a) See *Stuart* v. *The Earl of Bute*, *ante*, vol. iii. 212.
(b) 5 *Bro. P. C.* 534.

1806. of which differed much from those of Lord *Bute's* will, and are much more extensive: Viz. "stock in trade goods "and chattels in the Counties of *Northumberland* and "*Durham*." Upon such word there can be no doubt, that every thing passed. But the construction of this will is carried much further by this decree; which will also have this consequence, that, the use only being given to Lady *Bute*, she or her representatives must answer the amount of every thing. The money in the Bank, and due from the Fitter, and many other subjects of the exception to the Master's report, are liable to great fluctuation. Taking the whole together, nothing could pass which is consumed in the use. There is no expression in the will capable of application to money, except the word "things," and such a general word is always confined to things *ejusdem generis*. The same observation applies to the coals at the pits and staiths, which cannot be considered "things" within the meaning of these words "used or employed" in the management of the collieries. If Lord *Bute* had died intestate, or under a general bequest of his personal estate, there can be no doubt, that these articles would have been assets. The individual money, coals, &c. cannot be necessary. In almost every concern some part of the produce might be used in carrying on the concern, but the main, essential, produce cannot therefore be considered as used and employed in the working and management of that concern, and four of the articles comprised in the report are by no means exclusively applicable to this trade.

STUART v. The Marquis of BUTE.

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The Attorney-General, Mr. Romilly, and Mr. Steele, for the younger Grandchildren of the Testator, The Solicitor-General, and Mr. Newbolt, for the Trustees, in support of the Decree.—Lord *Rosslyn* by the expression, that the words of *Mr Wortley's* will were almost the same as those used by Lord *Bute*, must have meant, that in this will there are words equivalent to "stock in the coal trade." There is a distinction between things, destroyed by their use, and others, which, though their use is enjoyed, still continue. In a sense all these articles are in a course of destruction: some more than others. The general object of this testator must be looked to, with a view to see, whether the words are large enough to give it effect. A clear intention appears to separate this trust from the rest of the personal estate; for Lady *Bute* for life, with remainders to the grandchildren. The disposition is to be regulated by the general object, rather than the particular words. The intention is evident to give the whole stock in trade. The reference of The Lord *Chancellor* to the former cause was proper: as evidence of the testator's meaning. The question is not, whether the construction

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of any word is to be extended, but, on the contrary, whether the general word is limited by the context: as in *Le Ferrant* v. *Spencer* (a) *Pratt* v *Jackson*. (b) the case of household goods upon a contract with Government, upon which Lord *King's* decree was reversed The Court went a great way in narrowing the word "jewels" *Boon* v. *Cornforth* (c) is a strong case: the same words construed differently with reference to the subject matter. The money must have passed under the word "stock in trade," in *Mr. Wortley's* will; not under "goods and chattels," and it was as fair to argue upon that will, that the latter words were to be confined to articles *ejusdem generis* The money was not in the Counties of *Northumberland* and *Durham*, but in *Child's* Bank. That decision therefore must have gone upon the expression "stock in trade" The coals at the mouth of the pit are as necessary for carrying on the trade as any other article If they were all swept away at once the trade would be stopped, and essential injury would follow Apply this construction to the case of a brewery The effect would be a bequest of the trade in a state destitute of any present produce. As to the money, some line must be drawn Consider this construction with reference to money in the clerk's hands, to be paid on the day of the testator's death. There can be no distinction in principle between that and money in the Bank, to be subject to the drafts of the concern, perhaps in a week With reference to that article Lord *Rosslyn* speaks thus (a)

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"I do not consider this at all as money; and it is not "a fair way of considering it It has not any of the quali-"ties of money. It is not at the command of the party. "It is not used as money. It yields no interest. There "is no account of interest upon it. He cannot command "it. He cannot give a draft upon it. It is as much a part "of the machinery of the colliery, as any of the engines "used to procure the general result of profit of all the "component parts, real and personal, that enter into this "trade."

It yields its fruit, not as money, but as one article, combined with the rest of the machinery of the concern. Being appropriated to the working of the colliery, of which this testator was only one of several tenants in common, he could not have drawn it out. Certainly this would be personal estate under an intestacy, or a general bequest: but, admitting that, the question is, whether it is not taken out of the general mass; and given specifically in this way; the intention being to keep all this pro-

(a) 1 *Ves* 97. (b) 2 *P Will* 302. 3 *Bro P C*. 199
(c) 2 *Ves*. 277. (a) p 660 *Ante*, vol iii. 217.

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perty together, and to dispose of it, so kept together. This will has some expressions, very material, showing, something was intended, a part of the concern, and yet not used in working the colliery, * "*together with:*" meaning every thing, a part of the concern, besides what was actually used and employed in working it. It is not clear; that if the word "colliery" alone had been used, these things would not have passed. Under such a bequest by a testator concerned in leasehold collieries, every thing, a part of the trade, the debts to and from the concern, would all devolve upon the person, to whom it was so generally bequeathed. If more was due from the trade than to it, he could not call upon the residuary legatee to clear it for him. A mercantile concern must be taken, as it is given. the party must be entitled to all the debts, due to it, the time of credit not being expired, as he must pay the debts, due from it The greatest inconvenience would follow any other construction, as the account must be taken the moment of the death. Your Lordship therefore adopted that construction in *Kirton's* Case, (*a*) that the purchaser of a colliery was to take it with all the debts to and from it, on account of the extreme inconvenience, that would arise from a different construction. The objection, that several of these articles must be consumed by their use, would overturn many wills. In the instance of a bequest of stock in trade for life, the stock is consumed by the use, and replaced by other stock The case of *Porter* v *Tournay* (*b*) was determined, not upon that objection, but upon the ground, that wine was not comprehended under the words of that will. *Chapman* v. *Hart* (*c*) and *Lady Aylesbury's* case there (*d*) cited, show the liberal construction, that is given to these wills.

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Under a bequest of "my "house and all "that shall be "in it at my "death" cash passes, not promissory notes and securities

Whether Bank notes should be considered cash for this purpose, Query (1)

The Lord CHANCELLOR.—I have seen *Lady Aylesbury's* case; which is also mentioned by Lord *Mansfield* in *Miller* v. *Race*. (*a*) but has never been cited accurately. It was a bequest of "my house and all that shall be in it at "my death" Lord *Hardwicke* held, that cash passed; and Bank notes; which Lord *Hardwicke* there, I do not know why, considered as cash; but not promissory notes and securities; as they were the evidence of title to things out of the house, and not things in it. Bank notes I think just in the same situation.

Mr. Mansfield, in Reply.—Several of these articles, corn, oil, candles, &c. are not actually in use; but a stock, laid in for the future working of the colliery. The

(*a*) *Wren* v *Kirton, ante,* vol viii 502 (*b*) *Ante,* vol. iii 311
(*c*) 1 *Ves.* 271 (*d*) 1 *Ves* 273 (*a*) p. 662. 1 *Bur* 452.

{(1) See *Mann* v *Mann's Ex.* 1 Johns Cha Rep 237. *et seq.*}

money, coals, and other articles of that nature, must be continually fluctuating. Some money must be necessary: but any other money would answer the purpose equally. So, it is true, some stock must be kept up: but these identical, individual, articles are not essentially requisite.' The proposition, that coals are necessary for carrying on a colliery, is as absurd as, that corn is necessary for carrying on a farm. In the case of the brewery it could not be contended that the beer in the casks would pass. The objection, that the colliery would be stopped by the removing these things, has no foundation. No one article, in which the other partners had a property, could be taken away. The only consequence of their falling into the residuary estate would be, that they must be accounted for, as in the common case of partnership, the possession being undivided. There is therefore no objection from the distress, that would arise to the trade. Upon the known rule the general sense of the word "things" must be restrained to things *ejusdem generis*, and cannot therefore pass money, coals, &c. The distinction between money itself and the use of it is now perfectly settled. Yet it is contended, that, as the money is to be used and employed in the trade, Lady *Bute* is to have the absolute property in the money. There is a distinction between the money and the waggon ways, engines, &c. The latter, though certainly they will wear out, may last a long time: but the money cannot be used, as the other articles may, without instant destruction.' This does not resemble a bequest of every thing in the house, (a) which might very well pass money, though not securities for money; being only evidence of something out of the house; and themselves of no value. No two wills, with reference to the same subject, can be more different than the wills of Lord *Bute* and *Mr. Wortley*.

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The Lord CHANCELLOR.—It is necessary to look into that case, which is supposed to be an authority for this. At present I think, it has no manner of application, unless from the fact, what Lord *Bute* purchased, the inference can be drawn, what he intended to give by his will. A bill was originally filed by Lord *Bute*, insisting, that by the true effect of the will of *Mr. Wortley* Lady *Bute* had the power of appointing; under which she appointed to him. The allegations of the bill as to her power were very general. On behalf of the infant, who was to take an estate tail in the land, to be purchased with the personal estate, and to be settled to the same uses, as the estate in the *North Riding* of *Yorkshire* stood

(a) Lady *Aylesbury's* Case, cited, 1 *Ves.* 273

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limited, it * was insisted, first, that Lady *Bute* had no power of appointing by way of gift to any one; and there was no consideration for that appointment. Then the subordinate point was made, upon which the judgment was unnecessary, if the first point was determined in favour [* 664] of the infant, that money at *Child's*, the balances due from the fitters, &c. ought to be considered as passing, not with the colliery, but under the general residuary clause as to the personal estate, and a great deal of probable argument might be raised, whether money under those circumstances would pass by the words "stock in trade." Accounts of two agents had been from time to time drawn up, purporting to be accounts of land, and stock, and materials, and those sums in *Child's* Bank and in the hands of the fitters were constantly inserted. Possibly those accounts being constantly rendered might be evidence of what the testator intended by those words. Lord *Northington's* opinion was, that the appointment was bad, and, that the intention was either to give Lady *Bute* the profits for life with power of appointing to a person, who would buy the whole; or that, until she made an appointment to a person, who would buy the whole, the profits, and the money to arise by sale of the coal, were to be laid out in land. That is the only point determined in that cause, in which the bill was dismissed, and no judgment whatsoever was given upon the other question, stated on behalf of the infant. (1)

After that decision another bill was instituted by Lord *Bute*, stating, that he had become the purchaser; and, that the money he was to pay was to be laid out for Lady *Bute's* separate use for life; with remainder to the first named Defendant in tail, and remainders over. The infant was made a Defendant; who in that cause did [665] nothing more than submit his interest to the care of the Court. The points, raised, and not decided, in the former cause, were not raised in the latter. The moment it was decided, that the appointment was to be made to a purchaser for valuable consideration, the infant had no interest whatsoever in the question, for, whatever was to be bought by Lord *Bute*, the money was to be laid out, and settled: it was a matter of indifference to the infant, whether it passed as stock in trade, or as general personal estate: his interest in the land to be bought being precisely the same either way. What the Court ordered therefore was not, as Lord *Rosslyn* says, equivalent to a determination of the question.

I always thought, there was great difficulty in construing this will in any way, that would be satisfactory. The

(1) *Earl of Bute* v. *Stuart*, 2 *Eden's* Rep. 87, and upon the Appeal, 1 *Bro. P. C.* 476. Tomlins' Ed.

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necessity of having the articles in the trade is not a ground more strong than as evidence of intention After all it is but that, and, if the words are not sufficient, it is no more than insufficient evidence of intention. There would be equal necessity for these articles in a case of absolute intestacy, and yet they must have gone in value, not specifically, on account of the interest of the other partners, to different persons from those, entitled to the real estate. So, if he had been sole owner of this colliery, and had died intestate, most of these articles would have been personal estate, to be severed in enjoyment and value from those, taking the real estate; and, however necessary this property may be for carrying on the concern, it must, if taken by those, who had the real estate, have been paid or accounted for. In cases where persons, engaged in partnership, have bought freehold houses, the difficulty of distinguishing * and arranging property of different natures, partly personal, partly real, has never, except by the effect of the contract or the will been held sufficient against the heir Suppose *Mr. Wortley* had devised his collieries, not for the purpose of sale, but to the same uses as the estate, in the *North Riding* of *Yorkshire;* and an infant tenant in tail had lived but a year: all that was personal would have gone to the representative: all, that was real, to the remainder-man.

Partnership property of different natures, partly real, partly personal

The difficulty of disentangling and arranging it is no objection against the heir

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The question at last is, supposing the testator to have been conusant of the nature of his interest, and having regard to the rules of construction, whether he has used words sufficient to denote his intention, and to describe the property, of a different species, claimed under this clause. It seems agreed, that, unless the word "things," as connected with the subsequent words, will have that effect, no other word will. The cases have gone a great length in cutting down general words, according to the limited sense of preceding words There is no case upon the word "things," for that word was not in the will in *Chapman* v. *Hart* (a) The words "goods and chattels" will pass all the personal estate: but if those words come after "furniture," &c they are restrained to articles *ejusdem generis*, as in the case of a silver-smith; by whose bequest of all his furniture, books, goods, and chattels, his stock in trade would not pass; though the plate in his house, as household furniture, (1) would. Whether in this instance that rule should prevail against the generality of this word, attending to the nature of what is given, is a question which at present I think doubtful.

"Goods and chattels" will pass all personal estate, but after "furniture," &c are restrained to articles *ejusdem generis*

A silversmith bequeathing all his furniture, books, goods, and chattels, his stock in trade would not pass, though the plate in his house, as household furniture, would

(a) 1 Ves. 271

(1) *Bunn* v. *Winthrop*, 1 Johns. Cha. Rep. 329.

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The Lord CHANCELLOR.—I am very apprehensive, that Lord *Rosslyn's* decree has given a larger construction to the words of Lord *Bute's* will than they will bear, though not exceeding what I believe was the intention, and would have been expressed, if any person conversant with the subject had drawn the will. I have thought repeatedly, and with great anxiety upon it, and from any evidence and the nature of the subject I cannot tell, what the more limited construction ought to be, if there ought to be a more limited construction. Upon the whole, it is better for me to affirm the decree; not, as being satisfied with the principle of it, but, as I cannot make a decree, with which I should be better satisfied. That will put it into the course to go to the House of Lords, where the opinion of the twelve Judges may be taken upon the construction of the will

The decree was accordingly affirmed

On the 7th of *February*, 1806, The Lord CHANCELLOR resigned the Great Seal.

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